

**TITLE EXAMINATIONS/  
BEST PRACTICES**

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**SECOND ANNUAL TITLE GUARANTY CONFERENCE  
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TITLE GUARANTY DIVISION**

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## TITLE EXAMINATIONS/BEST PRACTICES

\*Some of these materials were presented on March 7, 2003, March 5, 2004, March 4, 2005 and March 3, 2006 at the Drake University Law School Real Estate Transactions Seminars and on September 15, 2006 at the University of Iowa College of Law Legal Issues in Real Estate and Property Law Seminar. The author has updated the information contained in Section I below. Additionally, new material has been included and can be found in Section II.

### SECTION I. Q & A.

**The following opinions are personal to the author and do not represent the opinions of the Title Standards Committee, The Iowa State Bar Association, or anyone else for that matter.**

#### 1. Subdivision – Easements.

**QUESTION:** When real estate is platted into a subdivision, are easements prior to platting required to be shown in the plat? Asked differently, does the abstract need to be searched prior to the platting for easements (perhaps all the way back to the original patent)?

**ANSWER:** Yes. When real estate is platted into a subdivision, the easements in existence prior to the platting should be shown on the plat. The abstractor does need to search for easements prior to the platting. Iowa Code § 354.6(2) provides, in part, that "Easements necessary for the orderly development of the land within the plat shall be shown and the purpose of the easement shall be clearly stated."

Iowa Code § 354.11 [Attachments to subdivision plats.] requires, in part, "An opinion by an attorney-at-law who has examined the abstract of title of the land being platted. The opinion shall state the names of the proprietors and holders of mortgages, liens, or other encumbrances on the land being platted and shall note the encumbrances, along with any bonds securing the encumbrances. Utility easements shall not be construed to be encumbrances for the purpose of this section."

2. **Subdivision – Attorney’s Certificate.**

**QUESTION:** How do you use an “Attorney’s Certificate” made as part of a plat in examining an abstract?

**ANSWER:** TITLE OPINION

COUNTY AUDITOR AND RECORDER  
WOODBURY COUNTY, IOWA

Dear Sir:

We have this date examined a complete abstract of title, pursuant to Iowa Code Section 354.11(3), to the property described in the Surveyor's Certificate on the Plat of [Name of Subdivision Plat] located in [Legal Description] last certified by [Name of Abstracter], Abstracters, dated \_\_\_\_\_, 20\_\_ at \_\_\_\_\_ .M. [to be same time as time of filing of plat] and from said abstract find good and merchantable title to said premises vested in [Name of Proprietor], [Type of entity], the proprietor, free and clear of all mortgages, liens and other encumbrances.

All certified real estate taxes and special assessments due and payable have been paid. Real estate taxes and special assessments not certified are a lien in an undetermined amount.

Dated:\* \_\_\_\_\_

\_\_\_\_\_  
[Name of Attorney]  
ATTORNEY AT LAW

\*The date of the title opinion must be the same date of the filing of the plat. There is no objection to the abstracter inserting the date and time of continuation of the abstract in the attorney's opinion at the time of filing the plat provided the attorney and abstracter have agreed this procedure is acceptable.

3. **Mortgage Releases.**

**QUESTION:** Section 589.8 of the Code of Iowa: How broad is the "or otherwise" language. I routinely accept releases/satisfactions of mortgage that have been filed greater than ten years, despite the defects. If Iowa Code Section 589.8 doesn't apply, not sure whether Iowa Code Section 614.21 applies if the mortgage is not yet 20 years old, etc. However, Title Standard 1.1 may come into play if no payments have been made for more than 10 years, and no enforcement action has been taken.

**ANSWER:** I too have accepted releases/satisfactions of mortgages that have been filed greater than ten years despite the defects, although I believe caution must be exercised if the name variance of the mortgagee (lender) is too significant to ignore.

4. **Doctrine of Merger.**

**QUESTION:** A final question has to do with the doctrine of merger. I have always believed that once a mortgagee obtains title to a parcel by virtue of foreclosure sale and sheriff's deed, or otherwise, there is no need to secure a release of the underlying mortgage based upon the premise that the lien of the mortgage is merged into, and extinguished by the doctrine of merger. I have come across a number of attorneys who nevertheless want a release of the mortgage in addition to the deed from the mortgagee-now titleholder. What are your thoughts.

**ANSWER:** I agree with you. Iowa Title Standard 7.3 provides as follows: Is marketability of title derived through foreclosure of a mortgage impaired by failure to release of record the instrument which created the interest foreclosed, or any instrument which created a junior lien or interest which was extinguished by the foreclosure? The Standard states "No". See also 3 J. Palomar, Patton and Palomar on Land Titles, §§ 564-66 (3d ed. 2003).

5. **Mortgage Releases.**

**QUESTION:** What should be required when a mortgage is released by a bank/lender which is different than the holder of the mortgage (as shown in the abstract)? Should it make any difference if you know from your own personal knowledge that the bank releasing the mortgage acquired the assets of holder of the mortgage (as shown in the abstract)?

**ANSWER:** A showing should be made concerning this name variance. The showing may be made by affidavit, corporate documents, recital in the mortgage satisfaction or release instrument, or other documentation which can be filed for record.

6. **Limited Liability Company – Conveyances.**

**QUESTION:** What showing is required when title will be acquired from an LLC? I do not see a title standard on this issue, however, I often see an affidavit filed by the attorney for the LLC stating which officers have authorization to act on behalf of the LLC. Where does this rule come from?

**ANSWER:** Affidavits showing which officers have authority to act on behalf of the LLC were prepared and filed prior to July 1, 2000. Iowa Code § 490A.702(8) was amended to eliminate the following provision which caused concern for many title examiners: "A person is deemed to have knowledge of a provision of the articles of organization limiting the agency authority of a manager or class of managers."

**The following new standard was approved by the ISBA Board of Governors on March 8, 2005:**

**15.3 PROBLEM:**

When real property is held in a limited liability company's name, how should it be conveyed?

**STANDARD:**

Real property acquired by a limited liability company ("LLC") and held in the LLC name may be conveyed only in the LLC name. Any conveyance from an LLC so made and signed by one or more members, one or more managers or one or more officers of the LLC, which conveyance appears to be in the ordinary course of the LLC business or affairs, shall be presumed to be authorized by the LLC in the absence of knowledge of acts, facts, or restrictions indicating a lack of authority. Absent actual or constructive knowledge to the contrary, recitals in the instrument of conveyance shall be accepted as sufficient evidence of such authority.

Authority: Iowa Code §§ 490A.202; .702(2), (3) and (7); and .710 (2003).

**COMMENT:**

If the Articles of Organization or Operating Agreement are of record, any conveyance should conform with their requirements.

7. **Dissolution Proceedings.**

**QUESTION:** Can you explain in what instances the examiner should require the showing of a quit claim deed from one former spouse when property is awarded to the other spouse? Sometimes it appears the decree is self-executing, sometimes the decree requires the delivery of a quit claim deed and one is shown, and sometimes a quit claim deed is required by the decree and one is not shown. Should the examiner object in the last instance?

**ANSWER:** If a dissolution decree requires the execution of a quit claim deed by the one spouse, then an objection should be made if the abstract does not show the quit claim deed. The common practice in many counties would be to require a quit claim deed if one is not shown in the abstract of title. However, Section 12.1(l) of G. F. Madsen, Marshall's Iowa Title Opinions and Standards, Second Edition at Page 261 provides, in part, that "A decree of a court in a divorce matter settling property rights is self-executing. Frequently the decree incorporates a direction that one party shall execute a deed of conveyance to the other party, or, in many of the older decrees, that a commissioner be appointed to make the conveyance. All this is unnecessary, however, and the decree of the court is a sufficient 'muniment of title.'" At Section 8.2 on Page 173 it is stated: "You do not state the provisions of the decree, but I assume that the court awarded the real estate to one or the other of the parties and may have directed one of the parties to convey the real estate to the other. In any event, a divorce decree is 'self-executing.'" See Scheffers vs. Scheffers, 241 Iowa 1217, 44 N.W. 2d 676 (1950).

8. **Dissolution Proceedings.**

**QUESTION:** If one spouse is a contract purchaser and goes through divorce, still as the contract purchaser, must the decree show that the contract purchaser interest was awarded to such spouse (even though the spouse is the only named contract purchaser)?

**ANSWER:** I find no requirement that the decree make such showing.

9. **Dissolution Proceedings.**

**QUESTION:** If real estate is titled in one party to the divorce prior to the divorce, in the absence of a quit claim deed from the other party after the divorce decree, must the decree show that such real estate was awarded to the party in whose name the property is titled?

**ANSWER:** I find no requirement that the decree make such showing.

10. **Power of Attorney – Homestead.**

**QUESTION:** If title is conveyed under a power of attorney, must the power of attorney include the legal description of the property or is it sufficient that it include simply the street address of the property?

**ANSWER:** Iowa Title Standard 5.6 provides that a release of a surviving spouse's statutory share or homestead rights is sufficient if made by one spouse acting as an attorney-in-fact for the other under a duly executed power of attorney except that if the property is the homestead, the power of attorney must set out the legal description of the homestead. The street address is not a legal description.

11. **Restrictive Covenants.**

**QUESTION:** Does an automatic renewal provision in restrictive covenants cause the restrictive covenants to remain in force after the 21 year limitation of §614.24? This is as in a provision used such as: "these covenants shall remain in force for 21 years from the date of filing and shall automatically renew for 10 years thereafter."

**ANSWER:** No. The right of enforcement must be preserved by the owner filing a verified statement of claim which must be properly indexed. See unpublished opinion of Hollingsworth vs. Hamilton, Iowa Court of Appeals No. 2-150/01-0971 filed July 3, 2002. See also Compiano v. Jones, 269 N.W.2d 459 (Iowa 1978).

12. **Restrictive Covenants – Easements.**

**QUESTION:** Does the 21 year statute of limitation in §614.24 serve to eliminate easements that are conveyed within restrictive covenants?

**ANSWER:** At Section 12.3(B) of G. F. Madsen, Marshall's Iowa Title Opinions and Standards, Second Edition, at Pages 276-277, it is stated:

An unusual application of Iowa Code § 614.24 was advocated in Krough v. Clark, 213 N.W. 2d 503 (Iowa, 1973). A dispute arose over the interpretation of a 1950 easement which imposed on the servient estate an easement 33 feet in width. The servient estate claimed, *inter alia*, a reduction in the width of the easement by reason of nonuser. Apparently at trial the owners of the servient estate asserted the right to use the full width of the easement was lost because a claim had not been filed under Iowa Code, § 614.24. In the trial court and on appeal the matter was not considered because of failure to plead the issue. As discussed in Section 12.3(A) Iowa Code, § 614.24 was not intended or designed to bar possessory easement rights.

**Footnote:** The application of Iowa Code, § 614.24 to easement rights has been reviewed by Professor Ryman, The Iowa "Stale Uses and Reversions Statute": Parameters and Constitutional Limitations, 19 Drake L. Rev. 56, 63 (1969). Iowa Code, § 614.36 provides in part: "This chapter shall not be applied . . . to bar or extinguish any easement or interest in the nature of an easement, the existence of which is apparent from or can be proved by physical evidence of its use; . . ." The phrase "This chapter" refers to Iowa Code, §§ 614.29 to 614.38, but the exclusion of easement rights from the operation of those provisions suggests the legislature never intended Iowa Code, § 614.24 with its 21-year limitation to be applicable to easement rights.

Similarly, Iowa Code, § 614.17 should not be interpreted as barring possessory easement rights. The desideratum is legislative clarification.

13. **Trustee Affidavits.**

**QUESTION:** In Black Hawk County, we are not requiring the intervivos seller and buyer trust affidavits with regard to conveyances by those investment banks holding title as trustee. For example: Wells Fargo Bank, as trustee under that certain trust agreement dated 02/01/97. This type of titleholder is becoming more frequent in cases of foreclosed properties. What is the practice in Woodbury County?

**ANSWER:** I am not certain of the type of trust agreement you reference. In certain instances where a bank is acting as trustee under a pooling and servicing agreement the trustee affidavits are not being requested. I believe in most instances, however, we are still requiring the affidavits under Iowa Code § 614.14(2).

14. **Soil Conservation Districts.**

**QUESTION:** What mention should be made in the title opinion concerning various filings along the lines of soil conservation districts, water sharing districts, etc.? When should they be included in the opinion and when can they be disregarded?

**ANSWER:** Iowa Title Standard 1.10 provides as follows:

**1.10 PROBLEM:**

When land is located in a city or county zoning district, or an airport hazard zone or district, or a city or county urban renewal or urban revitalization district, should the abstract show that fact?

**STANDARD:**

Yes. The abstract should include a reference to every ordinance, resolution and regulation of record which in any way regulates or restricts the free use of the land. Because of the nature of such restrictions and regulations, it is not necessary to abstract them extensively. A brief notation is sufficient.

Authority: Iowa Code Chapters 329, 335, 403, 404, 414 (2005).  
Iowa Code § 331.304 (2005).

15. **Quit Claim Deed.**

**QUESTION:** Can a quit claim deed serve as root of title?

**ANSWER:** Yes. See Iowa Title Standard 11.2 and the Comment in Paragraph (1).

**11.2 PROBLEM:**

What is an unbroken chain of title of record?

**STANDARD:**

"An unbroken chain of title of record" within the meaning of the Marketable Title Act may consist of (1) a single conveyance or other title transaction which purports to create an interest and which has been a matter of public record for at least forty years; or (2) a connected series of conveyances or other title transactions of public record in which the root of title has been a matter of public record for at least forty years.

Authority: City of Marquette v. Gaede, 672 N.W. 2d 829 (Iowa 2003).

**COMMENT:**

- (1) Suppose A is the grantee in a deed of a tract of land which was recorded in 1960 and that nothing affecting the chain of title to this land has been recorded since then. In 2000 A has an "unbroken chain of title of record." This is true without regard to whether the deed forming the root of title contained any covenants of title or was a quit claim. The instrument or proceedings which constitutes the root of title may, inter alia, be a deed, a will admitted to probate, an intestate administration or a decree of the Federal or State District Court of record in 1960.
- (2) Instead of having only a single link, A's chain of title may contain two or more links. Thus, suppose X is the grantee in a deed of a tract of land which was recorded in 1960, and X conveyed the same tract to Y by deed which was recorded in 1970. Y conveyed the same tract to A by deed which was recorded in 1980. In 2000 A has an "unbroken chain of title of record." Any or all of these links may consist, inter alia, of a deed, a will admitted to probate, an intestate administration or a decree of the Federal or State District Court.

The significant time from which the forty-year record title begins is not the delivery of the instrument, but the date of its recording. Suppose A is the grantee in a deed executed and delivered in 1960, but recorded in 1965. A does not have an "unbroken chain of title of record" in 2000 since forty years have not elapsed subsequent to the recording of the deed in 1965. A will not have the "unbroken chain" required by the statute until 2005.

16. **Estate Taxes – Showing Required.**

**QUESTION:** In Title Standard 9.12(l) it provides that “an adequate showing must be made with regard to the payment of, or nonliability of the estate for, federal estate taxes, or a specific release of the federal estate tax lien must be obtained.” What is an adequate showing? Is a report and inventory showing a gross estate under the exemption an adequate showing? Is a showing that an estate tax return will not be filed adequate? Is an affidavit from the attorney for the estate adequate?

**ANSWER:** Most title examiners rely on the probate inventory to establish that no federal estate tax return will be filed. Where it appears that a proper return has been filed and the tax paid, the examiner should require a showing of the estate tax closing letter and copies of checks showing payment of any tax due or a receipt from the internal revenue service showing payment of the tax. An affidavit from the attorney for the estate is also sufficient, in my opinion.

17. **Default Judgment – Notice.**

**QUESTION:** As you know, Rule 1.972 [renumbered from Rule 231 and amended November 9, 2001, effective February 15, 2002] of the Iowa Rules of Civil Procedure provides for the giving of a ten-day notice prior to the entry of a default judgment. Two questions:

- a. The Rule appears to apply to defaults entered by the clerk of court. Most attorneys, including myself, believe that the Rule should be followed even if the default is entered by the court. Nevertheless, one could read into the Rule that in those cases, the ten-day notice is not required. Have you ever discussed this matter and reached any consensus that perhaps it does not apply to judge-entered defaults?

**ANSWER:** My partner, who is a trial lawyer, tells me that he agrees with you that the Rule applies to judge-entered defaults. Apparently many clerks of court are reluctant to enter a default judgment and will send the file to a judge to make such determination.

- b. More important question: Do you find Rule 1.977 [renumbered from Rule 236 and amended November 9, 2001, effective February 15, 2002] as an effective cut-off to the ten-day mailed notice requirements of 1.972? I have begun to accept title as marketable in those cases where the decree is greater than 60 days old and there nevertheless is no showing in the abstract of compliance with the notice requirements of Rule 1.972. Is this O.K., or should I contact my E and O carrier . . . . ?

**ANSWER:** Rule 1.977 provides as follows:

“Rule 1.977. Setting aside default

“On motion and for good cause shown, and upon such terms as the court prescribes, but not ex parte, the court may set aside a default or the judgment thereon, for mistake, inadvertence, surprise, excusable neglect or unavoidable casualty. Such motion must be filed promptly after the discovery of the grounds thereof, but not more than 60 days after entry of the judgment. Its filing shall not affect the finality of the judgment or impair its operation.

“Renumbered from Rule 236 and amended November 9, 2001, effective February 15, 2002.”

As you know, the notice provisions of Rule 1.972 do not apply to default sought and entered against any party claimed to be in default when service of the original notice on that party was by publication. See Rule 1.972(4)(d).

I have not had a great deal of experience with these two Rules. It seems to me, however, that a default cannot be entered by the clerk or by the court without a certification by the attorney in the application for default that such written notice was given and a copy of the notice is attached. Therefore, can it be presumed that such written notice was given without any additional showings in the abstract?

In the case of Dolezal v. Bockes, 602 N.W. 2d 348 (1999) the Court concluded Rule 231(b) is procedural rather than substantive. The Court stated: "The short answer to Dolezal's argument is that the distinction between defendants who do not defend because of excusable neglect and those defendants who simply do not intend to defend is irrelevant on the question whether rule 231(b) applies. The rule plainly provides that 'no default shall be entered' unless the ten-day notice is given before the application for default is filed. The rule makes no distinction between excusable neglect and an intention not to defend. In addition, the rule does not require an answer or motion by the party against whom the default is sought. And we will not read such a requirement into the rule." Page 352.

With respect to Rule 236, now Rule 1.977, the Court ruled: "As its language implies, rule 236 is not an appropriate method of correcting the irregularity that occurred here. The irregularity was the court's entry of a default and a default judgment contrary to a rule of civil procedure. None of the grounds in rule 236 -- mistake, inadvertence, surprise, excusable neglect or unavoidable casualty-- covers this irregularity. The grounds --mistake, inadvertence, and excusable neglect-- imply conduct by the defaulting party that relieve that party from the default. Surprise and unavoidable casualty imply events outside of the control of the defaulting party that relieves the party from the default." Page 353.

18. **Short Form Acknowledgements.**

**QUESTION:** I use them extensively. I have run across a few attorneys who do not accept them. Perhaps something can be said on this point.

**ANSWER:** Iowa Code § 9E provides that short form certificates of notarial acts are sufficient and may be relied upon. Iowa Code § 9E.14(2) provides as follows:

2. A certificate of a notarial act is sufficient if it meets the requirements of subsection 1, and is in any of the following forms:
  - a. The short form set forth in section 9E.15.
  - b. A form otherwise prescribed by the law of this state, including those forms set out in chapter 558.
  - c. A form prescribed by the laws or regulations applicable in the place in which the notarial act was performed.
  - d. A form which sets forth the actions of the notarial officer and those are sufficient to meet the requirements of the designated notarial act.

**1.12 PROBLEM:**

Is an instrument containing a short form acknowledgment pursuant to Iowa Code § 9E.15 sufficient for recording?

**STANDARD:**

Yes.

Authority: Iowa Code § 9E.14(2) (2005).  
Iowa Code § 558.42 (2005).

**COMMENT:**

Iowa Code § 558.39 (2003), long form acknowledgment forms, was repealed by the 2004 Acts, Chapter 1052 § 10. However, acknowledgments pursuant to said repealed code section subsequent to its repeal comply with the requirements of Iowa Code § 9E.14(2) (2005).

19. **Affidavits.**

**QUESTION:** What types of title objections, generally, can an affidavit clear and what situations would you definitely not accept an affidavit to clear the objection?

**ANSWER:** Generally, affidavits may be used in the following situations:

- to clear name discrepancies and variances,
- to identify parties including marital status or type of entity,
- to explain stray deeds and mortgages,
- tax titles (e.g. 120-day affidavit; but not as to defective legal descriptions), and
- to clear errors on a plat.

Affidavits should not be accepted in the following situations:

- to release a restrictive covenant,
- to cure a defective legal description in a tax title,
- to take the place of or be used in lieu of probate proceedings where date of death is within the five year period,
- to place real estate in joint tenancy where conveyance was made to the parties as tenants in common,
- to establish title, e.g. title by adverse possession, and,
- albeit subjective, where the title examiner has grounds to doubt the reliability of the affidavit.

20. **Restrictive Covenants.**

**QUESTION:** Covering covenants in a title opinion.

**ANSWER:** I believe the title opinion must make reference to restrictive covenants by date of instrument(s) and filing date, book and page numbers. Also the following statement may be included in the title opinion: Expiration and extension of these covenants are governed by Iowa Code Sections 614.24-614.28, as amended.

21. **Escrow Agreement.**

**QUESTION:** A real estate contract makes reference to warranty deeds that have been placed in escrow with an escrow agent. Since the real estate contract transaction took place, several other transactions and events have occurred, e.g. one of the parties has died, some of the parties have established trusts, and so forth. Should I file for record the escrow agreement showing delivery of the deed to the escrow agent?

**ANSWER:** I would recommend such procedure. It is important to show delivery of the deed to the escrow agent prior to the events or transactions taking place that you have referred to in your question.

22. **Acknowledgement Date.**

**QUESTION:** If an acknowledgment date predates the date of the instrument, is the certificate invalidated?

**ANSWER:** Section 13.8(A-1) of G. F. Madsen, Marshall's Iowa Title Opinions and Standards, Second Edition at Page 294 provides, in part, that "an acknowledgment that does not substantially comply with the Code imparts no constructive notice. However, the date of the acknowledgment is apparently immaterial and an impossible or obviously wrong date does not, according to the general rule, invalidate the certificate."

23. **Assignment of Mortgage.**

**QUESTION:** A mortgage is executed by a mortgagor to an individual who is the mortgagee. The mortgagee assigns the mortgage to a third party individual and the spouse does not join in the assignment of the mortgage. Any problems with the assignment? Also, upon a release or satisfaction instrument being executed and delivered by the individual mortgagee, is the spouse required to sign off?

**ANSWER:** It is not necessary for the spouse to execute the assignment or the release or satisfaction of the mortgage.

24. **Horizontal Property (Condominiums).**

**QUESTION:** Iowa Code Section 499B.5 requires the deed to contain a description of land including the book, page and date of recording of the declaration.

See also Iowa Title Standard 14.2.

I am examining an abstract where the Horizontal Property Regime was submitted in 1990. None of the deeds makes reference to book and page number or date of recording. Is the description defective?

**ANSWER:** Short of obtaining corrective deeds, I would obtain an affidavit from an abstracter stating that the deed description necessarily refers to only one condominium regime, namely XYZ, and there are no other condominium regimes containing that name in the County. Additionally, an Affidavit of Possession pursuant to Iowa Code Chapter 614.17A should be obtained and filed for record using the correct legal description.

25. **Nonjudicial Foreclosure of Nonagricultural Mortgages.**

**QUESTION:** Chapter 655A. Is the filing of an affidavit required prior to publication of notice?

**ANSWER:** Iowa Code Section 655A.4 provides that notice or rejection of notice under this chapter shall be served as provided in the rules of civil procedure for service of original notice.

Compare to Chapter 656 Forfeiture of Real Estate Contracts whereby 656.3 provides, in part, that notice may be served personally or by publication, on the same conditions, and in the same manner as is provided for the service of original notices, except that when the notice is served by publication no affidavit therefor shall be required before publication.

26. **Conservatorship Deed.**

**QUESTION:** May a conservator execute a general warranty deed (being the same deed executed by the spouse of the ward) and not a court officer deed?

**ANSWER:** Provided all of the conservatorship proceedings (including notices) have been properly completed, then the conservator should execute the type of deed referred to in the court order approving the sale (which is typically a court officer deed). However, I don't believe it makes the conveyance deficient if a general warranty deed (and not a court officer deed) is executed.

27. **Real Estate Contract – Payments.**

**QUESTION:** If a real estate contract provides for a minimum payment of \$x per year, then may the contract buyer prepay the contract in full at any time?

**ANSWER:** Yes.

## **SECTION II. ISBA Listserve.**

The ISBA Listserve for the Real Estate and Title Law Section has proven to be a valuable resource for Iowa lawyers. And, as Iowa lawyer Mark V. Hanson points out, the responses have been clear evidence for the following principles:

- A. Lawyers' collegiality in Iowa is good.
- B. Lawyers with in-depth knowledge on a topic are willing to share and raise the knowledge level of all lawyers.
- C. Lawyers wanting to do what they can to have good land titles in Iowa and if they can point another attorney in the right direction, they have contributed significantly to that goal.
- D. Good example of what a useful tool the email net is to share among the real estate lawyers.

The following issues and responses have been obtained from the ISBA Listserve for the Real Estate and Title Law Section. The author has edited the facts, issues and responses for the reader.

1. **Dissolution.**

**FACTS:** Husband and Wife were divorced in December of 2005. As part of the dissolution proceedings they entered into a Stipulation and Agreement which provided that the marital home would be listed for sale through a licensed real estate agent. It further provided that the net proceeds would be distributed partially to Petitioner and partially to pay real estate taxes and related debts.

After the dissolution was finalized the Petitioner listed the real estate for sale. The Respondent was then arrested and convicted and is now incarcerated at Fort Madison. To complicate matters, there is now an offer on the real estate. The Petitioner has signed the acceptance of the Offer to Purchase; however, the Respondent refuses to sign the Offer to Purchase. It does not appear that the Respondent will be released any time soon.

**QUESTION:** How should the lawyer proceed?

**RESPONSE(S):** Per one Iowa lawyer's recommendation: Make application to the divorce court for authority to sell, without incarcerated's signature. The court has authority to enter a self-executing decree.

Another Iowa lawyer stated: Bring a contempt (show cause) action under the dissolution proceeding asking for the remedy that the decree be amended to title the house solely in the Petitioner.

**Caveat:** Be aware a guardian ad litem may need to be appointed for the incarcerated spouse and the incarcerated spouse may be entitled to a court appointed attorney under a contempt proceeding.

## 2. **Personal Property.**

**FACTS:** After Wife #1 dies, Husband signs an antenuptial agreement and marries Wife #2. Husband's Will leaves his estate to his children with Wife #1. Husband and Wife #2 have separate checking accounts in each of their names alone. They also have a joint household account to which they contribute equally. When they make a major purchase, they each contribute equally to the purchase and either write checks out of their personal accounts or out of the household account. They purchase two vehicles, and title them as follows: Husband "or" Wife #2. Husband dies.

**QUESTION:** Does Husband's estate own an undivided one-half interest in both vehicles or does Wife #2 own both vehicles as survivor? Did the use of the word "or" create joint tenancy in the vehicles? Or is additional language necessary to create joint tenancy in the personal property?

Case Law and Iowa Administrative Code:

1. Case law: The law for personal property is the same as for real property. If two individuals own personal property together, they own it as tenants in common unless there is clear intent to own it as joint tenants with rights of survivorship.
2. Case law: The law that allows a bank to pay funds to either person on an account is merely for protection of the bank. It does not change ownership of the account. So, if two individuals are on the account they own it as tenants in common unless there is indication they own it as joint tenants with rights of survivorship – for instance some bank forms contain a box to check on whether it is owned as joint tenants. If one individual takes all the funds, e.g. Wife #2, from an account that has no indication of joint tenancy, the bank is authorized to give her the funds. But the Husband's estate would have claim against Wife #2 for half the funds, not against the bank for paying the funds to Wife #2.
3. Iowa Administrative Code allows the County Treasurer to issue a new title to a vehicle upon the signature of one owner when title was held by two individuals using the word "or".

Ignoring some other exceptions, in all other cases the County Treasurer must have signatures from all owners e.g. when title was held by two individuals using the word "and". So if Husband and Wife #2 owned the vehicles "and", the County Treasurer will require the Husband's executors to sign the title.

**RESPONSE(S):** With regard to the vehicles, it appears that surviving Wife #2 owns both vehicles as survivor.

If Wife #2 testifies that the parties understood "or" to mean survivorship, what evidence could the Estate present to challenge this assertion, a question raised by one Iowa lawyer.

With regard to the bank account, the language contained on the account card will be critical in determining whether there is joint ownership.

3. **Antenuptial Contract.**

**FACTS:** Title opinion shows title in the name of Seller, "with spouse, if any, holding dower interest". Seller is married. Seller's attorney advises that the Seller's spouse cannot be located.

Seller and his spouse executed an Antenuptial Contract on December 2, 1994, the spouse being a Minnesota resident and the Seller being an Iowa resident. The Antenuptial Contract grants each party the sole and exclusive right to sell, mortgage, transfer, convey and dispose of any property he/she may now own or later acquire other than by virtue of marriage, as if he/she were not married and without joinder of the other in any instrument or conveyance.

The property is not titleholder's homestead.

**QUESTION:** Can the transfer occur without the spouse joining in/signing the deed?

**RESPONSE(S):** Yes, since the Seller alone acquired title. The Antenuptial Contract should be filed for record (or in the alternative, an affidavit with the requisite language of the agreement may be acceptable, provided the examining lawyer reviews a copy of the entire agreement).

Some other Iowa lawyers will not accept the antenuptial agreement and an affidavit based on how often these agreements are challenged and found not to be valid. They require the spouse's signature or a finding by the court that the antenuptial agreement is valid.

4. **Mortgage Electronic Registration Systems, Inc. (MERS).**

**FACTS:** The title opinion discloses a real estate mortgage to MERS as Nominee for XYZ Bank, followed by a mortgage foreclosure proceeding wherein the Plaintiff is MERS as Nominee for ABC Mortgage Services.

There is no assignment or showing of any successor in interest in the abstract of title.

The title opinion further discloses a Sheriff's Deed issued to MERS without any nominee showing.

**QUESTION:** Is MERS as Nominee for XYZ Bank a separate and a legally distinct entity from MERS as Nominee for ABC Mortgage Services? If so, is the mortgage foreclosure proceeding void since it was not brought by the proper party in interest?

**RESPONSE(S):** One Iowa lawyer's opinion is that the phrase "As Nominee For" is essentially equivalent to "As Trustee For". Therefore, the entities are separate and distinct and the foreclosure is void.

Another lawyer states assignments are required to document transfers. Title is not marketable.

Yet another lawyer will accept an allegation in the foreclosure petition that the mortgage had been assigned to the Plaintiff. (The lawyer handling the foreclosure proceedings should make certain there is a proper chain of assignments of record when the petition is filed.)

Black's Law Dictionary:

**"Nominee"** – 1. A person who is proposed for an office, position, or duty. 2. A person designated to act in place of another, usu. in a very limited way. 3. A party who holds bare legal title for the benefit of others or who receives and distributes funds for the benefit of others.

5. **MERS Mortgage Releases.**

**FACTS:** MERS releases a mortgage when MERS has taken the mortgage as Nominee and releases without showing its nominee status.

The MERS mortgage document (from the mortgage at issue) states:

**"DEFINITIONS**

(C) "MERS" is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the mortgagee under this Security Instrument.

(D) "Lender" is Mortgageit, Inc.

**TRANSFER OF RIGHTS IN THE PROPERTY**

This Security Instrument secures to Lender (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower irrevocably mortgages, grants and conveys to MERS (solely as nominee for Lender and Lender's successors and assigns) and to the successors and assigns of MERS, with power of sale, the following described property located in . . . All of the foregoing is referred to in this Security Instrument as the "Property." Borrower understands and agrees that MERS holds only legal title to the interest granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right to . . ."

Black's Law Dictionary, 8<sup>th</sup> Edition defines Nominee as . . . (2) A person designated to act in place of another, usu. in a very limited way (3) a party who holds bare legal title for the benefit of others or who receives and distributes funds for the benefit of others.

One lawyer argues the following:

When the mortgagee is MERS as Nominee for Mortgageit, Inc. it is not the same as MERS being mortgagee in its own name.

It is no different than if a deed was given to First National Bank as Trustee for the John Doe Trust. A Deed from First National Bank \_\_\_\_\_, without showing it is acting in its role as Trustee of the John Doe Trust would not be

accepted. A similar analogy may be where a Bank takes a mortgage as Trustee for a Pooling Arrangement.

The informal position of MERS is as follows:

MERS' agency relationship to the note owner is not identical to a trustee relationship because MERS is not a trustee and does not hold its liens in trust. MERS' contractual relationship to the note owner, as outlined in the MERS Member Agreement, follows the role of an agency relationship. A trustee relationship has different standards and requirements.

**QUESTION:** When the mortgagee is MERS as Nominee for Mortgaget, Inc., is it the same as MERS being mortgagee in its own name? Should an objection be made where MERS releases a mortgage without showing its nominee status?

**RESPONSE(S):** MERS was established to prevent the need of the assignment to be filed by each note holder. Accordingly, we have never required an assignment of the nominee status. To require the same would make the purpose of MERS null and void. I have seen numerous foreclosures in abstracts with MERS (which were then usually assigned by MERS at one point or another to the lender at that time).

MERS is the mortgagee on the mortgage, and nothing else. Thus, instead of the lender being mortgagee, MERS takes that role, but leaves all other roles with the lender. MERS holds the mortgage as mortgagee for the lender at the time the mortgage is granted or the assignment is made. But instead of holding it as nominee for just that lender, it is for the lender (or the note holder) – and “its successors and assigns” – whomever that might be. Thus, the combination of the language in either the mortgage or the assignment, of successors and assigns, coupled with a release (even if it lacks the nominee language) raises a level of presumption that MERS has the authority to release.

If MERS lacks the authority to release without the nominee language, what is to stop the next logical step of requiring that each nominee assign their interest as nominee from one to the other, and thus nullifying the entire existence of MERS?

The intent of all parties involved is to allow MERS to remain nominee for whomever the lender assigns the note to – whether or not it shows on the release. Given the enormous reliance upon MERS over the past few years, it would be shocking to require the nominee's match on releases and mortgages (or the last assignment).

Given the “successors and assigns” language, Title Standard 1.1, and the customary use of MERS over the past few years, there should be no reason to require the nominee appear on a release (or assignment from MERS for that matter).

\* \* \*

MERS is always the mortgagee. They have been nominated as the mortgagee by the lender that funded the loan. The “nominee” language describes MERS’ relationship to the underlying lender – and that it is not intended to limit or qualify MERS’ role as mortgagee.

\* \* \*

A Nominee is like a trustee or other agent. Proof of their authority to release the mortgage should be made of record, not assumed. If MERS wants carte blanc to release, they should take as “MERS, as Nominee for the lender/Mortgagee and successors and assigns,” or something to this effect.

6. **Merger of Des Moines Savings and Loan Association with Midland Financial.**

Check with the abstracters; or

You can get this information at

<http://www.ffiec.gov/nicpubweb/nicweb/nichome.aspx>

Use the institutional search link.

Click on advanced search and search current and/or non-current member information.

(Provided by James E. Rogers  
General Counsel  
The Title Resource Network  
First Dakota Title  
Sioux Falls, South Dakota)

7. **Mechanic's Lien Removal.**

**FACTS:** Contractor filed a Mechanic's Lien against homeowners on January 9, 2006. Homeowners in turn sent Contractor a demand to file suit January 12, 2006, pursuant to Iowa Code §572.28. No suit was brought. On February 20, 2006, the homeowners' lawyer filed with the Court a copy of the demand to bring suit and proof of mailing. Iowa Code §572.28(2) states that this shall be constructive notice to all parties of the due forfeiture and cancellation of the lien.

**QUESTION:** Does the homeowners' lawyer need to do anything further? Is a dismissal by the Court or the Clerk necessary?

**RESPONSE(S):** No further action is required.

8. **Trustee/Grantee Affidavits.**

**FACTS:** You are asked to render a title opinion covering a new mortgage from the trustee of an intervivos trust.

**QUESTION:** Do you require the Iowa Code §614.14(2) trustee's affidavit?

**RESPONSE(S):** Yes. See, however Iowa Code §633.4604.

**Note:** Some lenders require copies of the entire trust and any amendments to independently determine whether the trustee has the power to execute and deliver mortgages.

9. **Title in an IRA.**

**FACTS:** An abstract shows title to property to be held by John Doe, IRA, Bank Company, Trustee.

**QUESTION:** What is the validity of taking title in an IRA under Iowa law? How should title be conveyed out of the IRA? Can an IRA forfeit a contract?

**RESPONSE(S):** Treat the transaction as any other transaction involving a Trust. Require the Trustee Affidavit as set forth in Chapter 614 and require the Bank to execute a Fiduciary Deed. The Bank, as Trustee, has full authority to forfeit any contract.

10. **Impact of *Sieh* on Transfer from a Revocable Trust.**

**FACTS:** I am examining an abstract where the husband and wife acquired an interest in their homestead in 1968 and transferred the property to the wife as the Trustee of their revocable trust in May, 1998. They are now moving to a retirement community and I am examining for the new buyer. Prior to *Sieh*, a Trustee's Affidavit under Iowa Code Section 614.14(2) would have been required along with the buyer filing their affidavit of reliance and a deed being accepted from the trustee.

I still believe this is the appropriate case but I am somewhat concerned that the possibility exists of a similar issue as in *Sieh*.

**QUESTION:** Considering the impact of *Sieh*, is requiring a deed from the trustee, the trustee's affidavit and the purchaser's affidavit enough?

**RESPONSE(S):** It seems to me that the problem can be avoided by requiring a deed from the current beneficiaries (husband and wife), but I also think that such an action contradicts with the opinion that the Trustee is the actual owner of the property (why require the deed if no one else has an ownership interest). Further, I don't like to make unreasonable requests which may cause Sellers to question whether either the attorney who advised them on their trust or the examining attorney is competent.

I think that the holding in *Sieh* is limited to the question of spousal share and not title. Further, even if *Sieh* does become applicable, the heirs/beneficiaries should only have a claim against the proceeds and not the real property, especially where the sale is to a bona fide purchaser for fair market value (although the notice issue could possibly be raised).

11. **Trustee Deed with Spouse's Signature.**

**FACTS:** The following language is added to a deed.

"The Trustee, who is also the Settlor or creator of the trust, at this time is married to \_\_\_\_\_[Name]\_\_\_\_\_ who has executed this instrument only for the purpose of relinquishing all rights of homestead, dower and distributive share and/or in compliance with Section 561.13, Code of Iowa. The Settlor is also signing in his/her individual capacity to release homestead, dower and distributive share."

**QUESTION:** In view of the *Sieh* case 713 N.W. 2d 194 (Iowa 2006), is this language, when added to the trustee's deed where the settlor is married at the time of conveyance from a "living trust" along with the signature of the spouse properly notarized, enough to release dower and homestead rights?

If not married, a recitation of that fact would need to be made in the deed or in the trustee's affidavit. Is there any need to recite the marital history in the Trustee's Affidavit?

**RESPONSE(S):** You could put the recitations of marital history in the deed or the affidavit.

IN THE SUPREME COURT OF IOWA

**COPY**

No. 06 / 04-1219

Filed March 17, 2006

**MARY JANE SIEH**, Executor of the Estate of Edward A. Sieh,  
Appellant,

vs.

**RODGER ALAN SIEH** and **CARENE ELLEN LARSEN**, Trustees under the  
Edward A. Sieh Trust Agreement Dated May 19, 1992; **RODGER ALAN  
SIEH**, Individually; and **CARENE ELLEN LARSEN**, Individually,

Appellees.

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Appeal from the Iowa District Court for Grundy County, Thomas N.  
Bower, Judge.

Surviving spouse electing against will appeals from order refusing to  
include assets of revocable inter vivos trust created by decedent as property  
subject to the surviving spouse's statutory share under Iowa Code section  
633.238 (2003). **REVERSED AND REMANDED.**

Paul C. Peglow of Johnson, Sudenga, Latham, Peglow & O'Hare,  
P.L.C., Marshalltown, for appellant.

Mark E. Kirk and Jen Bries of Ball, Kirk & Holm, P.C., Waterloo, for  
appellees.

**CARTER, Justice.**

Mary Jane Sieh, surviving spouse of Edward A. Sieh, deceased, who has elected against his will, appeals from an order in probate refusing to include the assets of a revocable inter vivos trust created by Edward during his lifetime as property subject to Mary Jane's statutory share under Iowa Code section 633.238 (2003). The appellees are Rodger Alan Sieh and Carene Ellen Larsen, Edward's son and daughter, who are the beneficiaries of the inter vivos trust. After reviewing the record and considering the arguments presented, we conclude that because Edward had full control of the assets of the inter vivos trust at the time of his death, including the power to revoke the trust, the trust assets were property possessed by the decedent during the marriage and thus subject to the spouse's statutory share under section 633.238. We reverse the judgment of the probate court and remand the case to that court for recomputing Mary Jane's statutory share under that statute.

The revocable inter vivos trust at issue here was created by Edward on May 19, 1992. At that time, he was unmarried. On the day the trust was created, Edward transferred all of his personal effects, furniture, appliances, vehicles, tools, and shop equipment to the trust. On December 23, 1992, he transferred a substantial amount of Grundy County farmland owned by him to the trust. On June 21, 1998, Edward married Mary Jane. They remained married until Edward's death on September 25, 2003.

Rodger and Carene caused Edward's will to be proved and filed without present administration and notice of that act was published on October 9, 2003, and October 16, 2003. They also caused to be published on October 16, 2003, and October 23, 2003, the following notice:

To all persons regarding Edward A. Sieh, deceased, who died on or about September 25, 2003. You are hereby notified that Carene Ellen Larsen and Rodger Alan Sieh are the trustees of the Edward A. Sieh trust . . . .

Any action to contest the validity of the trust must be brought in the district court of Grundy County, Iowa, within the later to occur of sixty days from the date of second publication of this notice, or thirty days from the date of mailing this notice to all heirs of the decedent, spouse of the decedent, and beneficiaries under the trust whose identities are reasonably ascertainable . . . .

Creditors having claims against the trust must mail them to the trustee at the address listed below via certified mail, return receipt requested. Unless creditor claims are mailed by the later to occur of sixty days from the second publication of this notice or thirty days from the day of mailing this notice, a claim shall be forever barred.

A copy of the foregoing notice, which was in compliance with Iowa Code section 633.3109, was mailed to Mary Jane.

On February 20, 2004, Mary Jane caused herself to be appointed executor of Edward's estate and immediately filed an election to take against the will. She sought a declaratory decree in probate establishing that the assets of the revocable trust should be included in the statutory share that she would receive as a result of her election against the will.<sup>1</sup> Both Mary Jane and the appellees moved for summary judgment. The court overruled Mary Jane's motion and granted appellees' motion.

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<sup>1</sup>Pursuant to Iowa Code section 633.238 (2003), a surviving spouse electing against the will is entitled to the following share of the estate:

If the surviving spouse elects to take against the will, the share of such surviving spouse will be:

1. One-third in value of all the legal or equitable estates in real property possessed by the decedent at any time during the marriage, which have not been sold on execution or other judicial sale, and to which the surviving spouse has made no relinquishment of right.
2. All personal property that, at the time of death, was in the hands of the decedent as the head of a family, exempt from execution.
3. One-third of all other personal property of the decedent that is not necessary for the payment of debts and charges.

### **I. Scope of Review.**

Because the ruling being appealed was made by sustaining the appellees' motion for summary judgment, we review the issues presented for errors at law. *Wernimont v. Wernimont*, 686 N.W.2d 186, 189 (Iowa 2004). We examine the record to determine whether any genuine issue of material fact exists and whether the court correctly applied the law. *Id.*; *Hegeman v. Kelch*, 666 N.W.2d 531, 533 (Iowa 2003).

### **II. Probate Court's Ruling.**

In granting summary judgment in favor of appellees, the probate court concluded that, because the revocable inter vivos trust existed as a legally recognized entity separate and distinct from the estate of the decedent, the trust assets were not subject to a surviving spouse's election under section 633.238. In so ruling, the court acknowledged a split of authority on this issue from other jurisdictions. Cases cited by the court that agreed with its view included *Bezzini v. Dep't of Soc. Servs.*, 715 A.2d 791 (Conn. Ct. App. 1998); *Taliaferro v. Taliaferro*, 843 P.2d 240 (Kan. 1992); *Soltis v. First Am. Bank*, 513 N.W.2d 148 (Mich. Ct. App. 1994); and *Dumas v. Estate of Dumas*, 627 N.E.2d 978 (Ohio 1994). The court also noted in its ruling that the Iowa Court of Appeals in considering a request for a spouse's twelve-month subsistence allowance under Iowa Code section 633.374 has held that the assets of a revocable trust created by the decedent are not available for the payment of such allowance. *In re Estate of Epstein*, 561 N.W.2d 82, 87 (Iowa Ct. App. 1996).

Cases considered by the district court that subjected the assets of a revocable trust to a surviving spouse's election included *Dunnewind v. Cook*, 697 N.E.2d 485, 489 (Ind. Ct. App. 1998), and *In re Estate of Inter*, 664 A.2d 142, 147 (Pa. Super. Ct. 1995). The results in the latter two cases are consistent with the views that have been expressed by the American Law

Institute in the Restatement (Third) of Property (Wills & Don. Trans.) and the Restatement (Third) of Trusts. The Restatement (Third) of Property provides:

In a state whose statute subjects the decedent's "estate" to the [spouse's elective share], the elective share is applied to the value of the decedent's estate which, for purposes of calculating the elective share, includes (i) the value of the decedent's probate estate, (ii) the value of property owned or owned in substance by the decedent immediately before death but passed outside of probate at the decedent's death to donees other than the surviving spouse, and (iii) the value of irrevocable gifts to donees other than the surviving spouse made by the decedent in anticipation of imminent death.

Restatement (Third) of Property: Wills and Donative Transfers §9.1(c) (2003). Comment j to this section of the Restatement provides:

Although property owned or owned in substance by the decedent immediately before death that passed outside of probate at the decedent's death is not part of the decedent's probate estate, such property is owned in substance by the decedent through various powers or rights, *such as the power to revoke, withdraw, invade, or sever*, or to appoint the decedent or the decedent's estate as beneficiary. Consequently, for purposes of calculating the amount of the [spouse's] elective share the value of property owned or owned in substance by the decedent immediately before death that passed outside of probate at the decedent's death to donees other than the surviving spouse is counted as part of the decedent's "estate." The decedent's motive in creating, exercising or not exercising any of these powers is irrelevant.

Restatement (Third) of Property: Wills and Donative Transfers §9.1 cmt. j (2003) (emphasis added).

The Restatement (Third) of Trusts provides:

A trust that is not testamentary is not subject to the formal requirements of § 17 [requirements for execution and witnessing] or to procedures for the administration of a decedent's estate; nevertheless, a trust is ordinarily subject to substantive restrictions on testation and to rules of construction and other rules applicable to testamentary dispositions, and in other respects the property of such a trust is ordinarily treated as though it were owned by the settlor.

Restatement (Third) of Trusts § 25 (2003). Comment d of this restatement provides:

[I]n most American jurisdictions the surviving spouse of a married decedent is entitled to a share of the estate of which the spouse cannot be deprived by the decedent's will in the absence of an election by the spouse to accept something less or different, or nothing, as may be provided by the decedent's will. Although modern versions of these so-called "forced" or "elective" share statutes vary considerably in language and in details of implementation, a married property owner cannot properly circumvent the policy of such statutes through the use of an inter vivos trust that is *revocable*, directly or indirectly (such as through an unrestricted power of amendment or appointment), by the settlor.

Restatement (Third) of Trusts § 25 cmt. d (2003).<sup>2</sup>

The issue now presented to this court is one of first impression. Over ninety years ago, we determined that the assets in an irrevocable trust created by a deceased spouse during his lifetime could not be included in the surviving spouse's statutory share following an election against the will. *Haulman v. Haulman*, 164 Iowa 471, 484, 145 N.W. 930, 935 (1914). In so holding, we emphasized the lack of control that the decedent had over the trust assets. *Id.* In the present case, the decedent had complete control over the trust assets at all times prior to his death. Under the position adopted by the American Law Institute in the Restatements to which we have referred, that fact would allow the assets in the revocable trust to be included in the statutory share of Edward's spouse electing against the will. We adopt the view of the American Law Institute on this issue. Although

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<sup>2</sup>Section 2-202 of the Uniform Probate Code also provides for an augmented estate in computing the spousal elective share, including assets in revocable trusts created by the deceased's spouse. After this case had been decided in the district court, the Iowa legislature amended section 633.238 to include the assets in revocable trusts created by a deceased spouse in the surviving spouse's statutory share. 2005 Iowa Acts ch. 38, § 14. This legislation would be significant to our present consideration only if our attempt to determine what the law was prior to the amendment leaves us with some doubt. *Bob Zimmerman Ford, Inc. v. Midwest Auto. I, L.L.C.*, 679 N.W.2d 606, 610 (Iowa 2004). For the reasons we indicate in our opinion, it does not.

Edward very likely did not intend for Mary Jane to share in any of the trust assets, we are satisfied that this is her right by reason of section 633.238.

In adopting this position, we are influenced by the fact that we have previously recognized the right of a general creditor to proceed against the assets in a revocable inter vivos trust for purposes of satisfying a valid claim filed in the estate of the settlor. *In re Estate of Nagle*, 580 N.W.2d 810, 811 (Iowa 1998). Although the appellees point out that the trust in *Nagle* contained language authorizing the payment of debts, we did not decide the case on that basis. We relied on the principle that a trust settlor should not be allowed to retain all the benefits of ownership without assuming any of the burdens. *Id.*

We are convinced that the rights of a surviving spouse should not be less favored than the interests of general creditors. We conclude that the district court erred in not subjecting the assets of the revocable inter vivos trust created by Edward to Mary Jane's spousal election under section 633.238.

### **III. Whether Mary Jane's Election is Time-Barred Pursuant to Iowa Code Section 633.3109.**

The district court concluded that, even if Mary Jane was entitled to subject the assets of the revocable trust to her spousal election, that election was time barred by reason of Iowa Code section 633.3109. That statute provides for the giving of notice of the type served on Mary Jane by the trustees and provides that, unless an action to contest the validity of the trust is brought within the later to occur of sixty days from the date of the second publication of the notice or thirty days from the date of mailing the notice, such claims are barred. Iowa Code §633.3109(3)(d). This statute further provides creditors having claims against a trust must

mail proof of their claim to the trustee via certified mail, return receipt requested, within the later to occur of sixty days from the second publication of the notice or thirty days from the date of mailing of the notice, or thereafter be forever barred.

Iowa Code § 633.3109(3)(e).

Mary Jane urges that these statutory provisions do not bar her election to take against the will that has been filed in the probate court. We agree. Mary Jane is not challenging the validity of the trust and is not seeking payment from the trust as a creditor. She is seeking to have the assets of the trust subjected to her statutory election against the will pursuant to section 633.238. The probate court is granted authority to make that determination as the result of her election against the will. Mary Jane was not required to litigate the issue in both the estate and the trust.

We have considered all issues presented and conclude that the judgment of the district court must be reversed. The case is remanded to that court for a determination of Mary Jane's spousal share under section 633.238 in accordance with the directives of this opinion.

**REVERSED AND REMANDED.**

12. **Termination of Pasture Lease.**

**FACTS:** Farmer has a written cash rent lease for Iowa pasture ground with a Kansas landlord. The Lease provides for "60 day notice" of termination. Farmer receives a certified letter Saturday notifying the land is being sold and landlord is terminating in "30 days".

**QUESTION:** Do the provisions of Iowa Code Chapter 562 apply for termination of the lease (notice served on or before September 1)?

**RESPONSE(S):** No. September 1 notice provisions only apply to 40 acres or more of cropland, not pastureland.

See, however, Morling v. Schmidt, 299 N.W. 2d 480 (1980) and Neil D. Hamilton, Legal Aspects of Farm Tenancies in Iowa, 34 Drake L. Rev. 267, 292 (1984-1985).

13. **CRP Contract; Duty of Purchaser.**

**FACTS:** Farm-tenant purchased the farmland that he had rented for several years. Part of the land was enrolled in the CRP program by the sellers who received the payments. The purchase contract did not address the CRP program nor the buyer's obligation to maintain compliance with the requirements of the program. The buyer has now decided, post closing, to farm all the land including the land enrolled in the program which will cause the sellers to be obligated to the USDA to repay approximately \$13,000 of prior benefits.

**QUESTION:** Is the buyer obligated to maintain compliance with the CRP?

**RESPONSE(S):** Probably not. The sellers should have addressed this issue in the purchase contract.

14. **Contract Forfeiture – Lienholders.**

**FACTS:** A sells on contract a residential property to B. B, a few years later, quit claims and assigns his interest to C. C subsequently defaults on the contract and A forfeits the contract.

All instruments are filed for record.

**QUESTION:** Do judgments against B attach to the property and remain a lien after the completion of the forfeiture proceedings?

**RESPONSE(S):** No. The judgment creditor of B has no greater rights than it had if B still was the contract buyer and was forfeited.

Notice of the forfeiture is required on the lienholder only if request for notice pursuant to Iowa Code §656.2(d)(2) is filed for record.

15. **Grounds for Real Estate Forfeiture.**

**FACTS:** A lawyer represents a contract buyer subject to an installment real estate contract forfeiture. The only grounds is the allegation "allowing property to be declared a specified crime property" under Des Moines City Codes. The real estate contract is silent on the subject other than "care of property."

**QUESTION:** Is this a valid reason for a forfeiture?

**RESPONSE(S):** Take a look at the ordinance on specified crime property to get a handle on what it entails, and what the city has for recourse against a property owner and/or a contract seller.

16. **Foreclosure.**

**FACTS:** Owner mortgaged property to Bank A. Subsequently Bank B commenced a foreclosure action. No assignment from Bank A to Bank B is filed for record, until more than a year after the Sheriff's Sale. The assignment was dated about 6 months after the Sheriff's Sale.

Bank C purchased the property and received the Sheriff's Deed.

Iowa R. Civ. P. 1.201 requires all actions be brought by the "real party in interest". Iowa R. Civ. P. 1.201 also allows curing by ratification, joinder or substitution.

**QUESTION:** How do you remedy this problem: require Bank A to file a ratification of the foreclosure proceedings or re-do the foreclosure proceedings?

**RESPONSE(S):** Some lawyers will accept an affidavit and/or ratification by Bank A to cure the title problem.

Yet other lawyers didn't require any further action because Real Party in Interest is an affirmative defense that either was not raised and therefore waived, or if raised, received adverse treatment by the trial court and was not appealed.

Remember, Bank B had to surrender the original note to be cancelled by the Clerk of Court in order to obtain judgment. Iowa R. Civ. P. 1.961.

A post-foreclosure assignment of mortgage should recite that it was intended to memorialize a transfer which occurred prior in time to the recording of the assignment.

17. **Mortgage Foreclosure.**

**FACTS:** I need some help concerning a mortgage foreclosure that includes a mobile home which is not considered part of the real estate. In other words, the Bank took a mortgage on the real estate. In addition, the Bank retains the title to the mobile home with their name on the title as the mortgage holder. The real estate alone will not cover the outstanding loan amount. It would appear to me as if I will have to foreclose the mortgage first and not waive a deficiency. I will then have to proceed to go after the mobile home.

**QUESTION:** Can I combine the two steps into one?

**RESPONSE(S):** Iowa Code Section 643.2 seems to prohibit joining anything with a replevin action, but since Iowa Code Section 554.9601(1)(a) allows foreclosure of the security interest by any available judicial procedure, what would stand in the way of adding a count foreclosing the security interest in the mobile home to the petition for judicial foreclosure of the real estate mortgage?

\* \* \*

The two steps cannot be combined, but why not proceed against both at once. Foreclose the mortgage (assume the title to mobile home is in the name of the debtor with lien of the bank noted on the title), file a replevin action on the mobile home at the same time or explore filing foreclosure; get the bank appointed receiver to take control of the property, then lease the same, etc. which would include the mobile home – then you would have to snag the land and the mobile home at the same time.

18. **Foreclosure – Is there overplus after issuance of a sheriff's deed?**

**FACTS:** There was a mortgage foreclosure for a local bank against the owners of a personal residence. The judgment was entered on April 18, 2005. At the time of the foreclosure proceedings, it appeared that the home was worth the amount of the indebtedness. Since the home was located in a small town the bank did not want to give up its rights to a deficiency in case the home's value or the market declined. A special execution was done and the bank bid in the amount it was owed on June 14, 2005. A list of costs/expenses was filed for costs advanced after the judgment. There was no redemption. Apparently, the mortgagors had some marital issues and separated. At the very end of the redemption period, the remaining mortgagor abandoned the property, and the whereabouts of either mortgagor is unknown. The bank is now in the process of getting a sheriff's deed to the property.

Iowa Code §§ 654.7 and 654.9 indicate that if there is an overplus . . . after satisfying the mortgage and costs . . . such overplus shall be paid to the mortgagor. Iowa Code § 626.82 in the execution chapter also deals with overplus basically indicating a similar concept.

However, once the bank gets a deed does this still apply? From the concept that the bank could still get a deficiency it would seem that if there is an overplus the bank would need to return it. Some think that if the bank gets its deed, it can then resell the property and keep the proceeds. At this juncture, the property has not been sold, but the bank intends to take steps to sell the property as soon as it obtains the deed.

**QUESTION:** Is the bank entitled to keep any overplus resulting from the sale of the property?

**RESPONSE(S):** The overplus referred to here is the overplus which would result if a third party appeared at the sheriff's sale and actually bid more than the judgment, interest and costs. If that were the case, the bank would be paid in full for its mortgage and extra money would be available to satisfy junior lien holders or to return to the mortgagors if no other liens were present. Once the redemption period expired and the bank gets its deed, it is entitled to whatever profit (or loss) is made when it sells the property. Once the redemption rights expire, the mortgagors and other lien holders are cut off.

With that said, how could the bank have a deficiency? If the bank bid the amount of its judgment, interest and costs, there is no deficiency. A deficiency would only exist if the sale of the collateral brought less than the amount of the judgment. Then you would have a deficiency judgment which would remain unsatisfied.

19. **Marketable Title Act.**

**FACTS:** A Warranty Deed was filed for record in 1952. A Contract sale occurred in 1955. Contract Buyer subsequently assigns of record the Contract in 1957. A Warranty Deed was filed for record from the Assignee to the new purchaser in 1967. The chain of title is good thereafter.

**QUESTION:** Is this an unbroken chain of title of record for 40 years? Can the fact that there was no deed from the 1952 owner in fulfillment of the contract to Assignee (the 1967 Grantor) be corrected using Iowa Code §614.17 or §614.17A denying any claim by the 1952 deedholder who did not give a deed in performance of the contract? Iowa Title Standards appear to say that §614 claims can correct errors in the 40-year chain of title. Does §614.17 or §614.17A create the unbroken chain of title?

**RESPONSE(S):** An Affidavit of Possession is acceptable and may be relied upon as a cure or remedy for imperfections, provided the statute of limitations under Iowa Code §614.21 had run in relation to enforcement of the Contract (twenty years from the date of the contract, or ten years of the stated maturity date of the Contract). As long as Iowa Code §614.17 and .17A's time has run, an affidavit thereunder would solve the problem, assuming from the stated facts that the last payment date under the terms of the Contract had passed under Iowa Code §614.21. Iowa Code §§ 614.17 and 614.17A should be used to eliminate title defects occurring within the forty-year chain of title.

See Title Standards 10.1 and 11.5.

20. **Filing of Closing Letters and Releases of Real Estate from Estate Tax Lien.**

**FACTS:** The Polk County Clerk wants to see authority for the Clerk to accept Estate Tax Closing Letters and IRS Estate Tax Releases in a Clearance from Inheritance Tax ("CIT"). The whole purpose of the CIT procedure is to obtain a Clearance from Inheritance Tax liability. When a CIT is filed, where does the Clerk expect the tax clearance to be filed? Since other counties seem to be experiencing the same problem, this may be a matter for the Chief Judge of each district to address with their Clerk of Court. The Probate Section Council may also need to address this problem with the Chief Judges by raising this issue for discussion at a Probate Section Council Meeting.

**QUESTION:** What authority is there for filing in the Clearance from Inheritance Tax?

**RESPONSE(S):** Some lawyers prepare an Affidavit reciting that these releases and clearances have been obtained and attach copies of the Clearances to the Affidavit. The appropriate page from the Inventory with the legal descriptions may also be attached.

21. **Late Will Found.**

**FACTS:** Property was transferred to a testamentary trust in accordance with the Will during probate. A subsequent Will has been found and filed with the Clerk. Four months have passed from the time the first Will was admitted and Notice published. No new beneficiaries or trustees are named in the newer Will. The main difference is the name of the Trustee and the ultimate disposition of the property. The new remaindermen are only three of the former remaindermen. The Estate is still open. A Court Officer Deed transferred the land to the Trustee under the terms of the first and older Will.

**QUESTION:** Is it possible for the newer Will to be approved and the terms supersede the terms of the older Will?

**RESPONSE(S):** I'm not certain what you mean when you state that no new beneficiaries or trustees are named in the newer Will because you then state the main difference is the name of the trustee and the new remaindermen are only three of the former remaindermen. In any event, doesn't the statutory notice (provided it was properly published and mailed pursuant to Iowa Code Section 633.304) bar any action to set aside the Will? Seems you will want to get a ruling from the Court since the new Will has been filed.

22. **Termination of Life Estate.**

**FACTS:** Iowa Code Section 558.41(4) states: "*Termination of life estate.* Upon the termination of a life estate interest through the death of the holder of the life estate, any surviving holder or successor in interest shall prepare a change of title or affidavit for tax purposes and shall deliver such instrument to the county recorder of the county in which each parcel of real estate is located."

**QUESTION:** Does anyone have a form of affidavit under Iowa Code Section 558.41(4)?

**RESPONSE(S):** See attached Affidavit Explanatory of Title to Real Estate.

**AFFIDAVIT EXPLANATORY OF TITLE TO REAL ESTATE**

**Recorder's Cover Sheet**

**Preparer Information:** (name, address and phone number)

**Taxpayer Information:** (name and complete address)

**Return Document To:** (name and complete address)

**Grantors:**

**Grantees:**

**Legal Description:** See Page 2

**Document or instrument number of previously recorded documents:**

STATE OF \_\_\_\_\_ :  
 : ss.  
COUNTY OF \_\_\_\_\_ :

1. I am the son of \_\_\_\_\_, who died on the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, and the son of \_\_\_\_\_, who died on the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_. My sister \_\_\_\_\_ and I are their only children.

2. Prior to my parents' deaths, the following described real estate was held in a life estate for \_\_\_\_\_, with the remainder to \_\_\_\_\_ and \_\_\_\_\_, as joint tenants with full rights of survivorship, pursuant to a warranty deed dated \_\_\_\_\_ and filed in Book \_\_\_\_\_, Page \_\_\_\_\_:

3. No probate proceedings were required by state or federal law.

4. Form 706, United States Estate Tax return, is not required to be filed as a result of the deaths of the Decedents. All surviving owners are lineal descendants and therefore are persons exempt from inheritance tax pursuant to Iowa Code §450.9.

5. No successor is under any legal disability.

6. Therefore, as a matter of law, the above-described real estate is vested in \_\_\_\_\_ and \_\_\_\_\_, as joint tenants with full rights of survivorship and not as tenants in common. I hereby request that the Auditor enter this information on the transfer books pursuant to the Iowa Code.

, Affiant

Subscribed and sworn to (or affirmed) before me by \_\_\_\_\_ on this  
day of \_\_\_\_\_, 20\_\_\_\_.

Notary Public in and for said State

23. **Change of Title as a Stray Instrument.**

**FACTS:** While reading an abstract the following issue was found in which a Change of Title may be a stray conveyance.

In 1974 A and B (husband and wife) convey Black Acre to C by Warranty Deed. C has openly possessed Black Acre ever since.

In 1989 A dies intestate leaving a surviving spouse and eight children, and his estate is probated. Black Acre is shown as real estate owned jointly by decedent and surviving wife. In 1991, a Clerk of Court Change of Title for Black Acre to B as surviving spouse is issued and recorded.

In 2000 B dies and no estate proceeding is pursued for her. Also since 1989 one child of A has died and another child is legally incompetent so obtaining quit claim deeds from the surviving heirs is impractical or impossible.

The abstract showed that B had later conveyed the subject real estate to one of her children and that a bank had issued two separate mortgages including the real estate that was examined.

**QUESTION:** Does C have marketable title? Is the probate proceeding and the Clerk's Change of Title a stray instrument that can be cut off by an affidavit pursuant to Section 614.17A? If C does not have marketable title, is any legal avenue short of a quiet title action available to obtain marketable title?

**RESPONSE(S):** The 1991 change of title needs to be treated as a stray deed since it breaks the chain of title began in 1974 and there was no subsequent conveyance after 1991 and more than ten years ago that could be the basis of using Section 614.17A. An affidavit of disclaimer under Title Standard 4.5 can be obtained from anyone having personal knowledge of the facts if the grantee of the stray instrument is not available. The party would have to know that A and B had conveyed their interest in 1974 and had not received any conveyance back subsequent thereto and therefore the listing of the property in A's estate was an error. Hopefully, one of the living children would have such knowledge.

Change of Title is used only for the purpose of allowing the County Auditor to track changes in ownership of land for tax purposes and the actual document changing the ownership (title) of the property is the document which the title examiner needs to be concerned. In this case, A died with no ownership interest in the property but it was mistakenly listed in his estate.

The showing in the abstract of A's probate proceeding where the property is listed as joint property raises the stray claim that must be dealt with. The clerk of court is merely reflecting the records of the probate and so it would seem somebody familiar with the facts of the probate proceedings should correct the record by an affidavit of disclaimer.

The Change of Title was probably issued pursuant to an order approving the Final Report. Can an Application Nunc Pro Tunc be used to set forth the reason that the Order that approved the Final Report was incorrect and then have the court enter an Order Nunc Pro Tunc stating that the previous Change of Title was a nullity? The Order Nunc Pro Tunc can also state that a corrected Change of Title is to be delivered to the Auditor to show the first Change of Title was incorrect and that the title is vested in C. The Clerk and the Auditor may be more comfortable if there is a court order.

24. **Probate Without Present Administration.**

**FACTS:** A resident testate decedent transferred title to her real estate through the Will. The heirs are her only two natural children. The Will was admitted to probate without present administration and properly noticed. There is a showing that no federal estate tax or Iowa estate and inheritance taxes are due and a CIT is shown. All known claims have been paid and the heirs are willing to execute an affidavit to this effect. All but one of the requirements of Title Standard 9.13 have been met. The only problem is the decedent passed away in November, 2004, so five years have not passed yet, therefore a creditor claim could still arise.

**QUESTION:** Is there a manner in which to obtain marketable title to the property without requiring a full probate of the estate? Can the warranties of title in a warranty deed from the heirs and/or Title Standard 1.1 be relied upon? What is the risk of litigation?

**RESPONSE(S):** A full probate is required. Claims remain unresolved and under the Title Standards can be resolved only with publication of notice and of mailing of notice as required under Iowa law. Otherwise, the title will not be merchantable for a period of five years from date of death.

The heirs may be receptive to some practical alternatives in lieu of opening the estate for probate. Obtain an indemnification agreement from the Seller (assuming they have some wherewithal) for any claims against the property arising from conducting an estate without administration in lieu of a full probate, for the period remaining until the five year period has passed. Make the indemnification assignable to any subsequent owner of the property.

See Title Standard 9.7.

25. **Mortgage Signed Early.**

**FACTS:** Assume Buyer can't be at the closing. Buyer signs the mortgage (and other documents) a few days before the closing in front of a Notary. A few days later, Lender holds closing (without Buyer physically being present), and then records the deed (dated the date of closing) followed by the mortgage (which was signed before the date of the deed).

**QUESTION:** Do you see any title problems for the Lender if foreclosing on the mortgage at a later date?

**RESPONSE(S):** No. See Title Standard 7.2: Problem: "Is a mortgage valid as to third parties if the mortgage is executed subsequent to the execution of the instrument by which ownership is acquired but recorded prior to the recording of said instrument of conveyance?" The Standard is "Yes". The Comment is very helpful. "If the instrument of conveyance is both executed and recorded after the filing date of the mortgage, then such mortgage is invalid as to subsequent purchasers not having actual notice thereof. This is due to Iowa's recording statutes which do not impart constructive notice of an instrument (e.g., mortgage) which is recorded outside the chain of title."

26. **Warranty Deed Amendment.**

**FACTS:** A warranty deed for a condominium unit, which was executed as part of a sale a year ago, reflects a legal description identical to that which the seller acquired but does not include the undivided common interests in an additional lot that was subsequently added to their ownership interests by the developer some time after they had acquired the property.

**QUESTION:** How do you proceed? Can this situation be avoided in the future when (1) the subsequent expanded common interest is unknown by the condominium owner, (2) an "Amendment to Declaration of Submission of Property to Horizontal Property Regime" was filed and recorded but grantee's name is not indexed, only the condominium unit numbers, and (3) the abstract pencil notes state "Conveys: Same as in Caption." when the legal description is different?

**RESPONSE(S):** Iowa Code §499B.7(2) states that no unit can be conveyed separate from its interest in the common elements even if the deed fails to state the interest in the common elements correctly or at all. The amended Declaration governs what common elements go along with the unit, not the deed language.

The Story County Bar Association adopted a title standard that suggested a format for the legal description that states "including an undivided fractional interest in the common elements . . . as determined for said unit by the provisions of . . . the Declaration of Submission to Horizontal Property Regime for \_\_\_\_\_ filed on \_\_\_\_\_ and recorded \_\_\_\_\_ (and any supplements and amendments thereto)."

27. **Title Standard 7.2.**

**FACTS:** Some abstracters report two dates for an instrument. They are as follows:

Dated: xx/xx/xx  
Filed: xx/xx/xx

But, occasionally they will report it as follows:

Dated: xx/xx/xx  
Acknowledged: xx/xx/xx  
Filed: xx/xx/xx

**QUESTION:** Can we presume that the "Dated" date is the date the document was executed. This is crucial because Title Standard 7.2 determines the validity of a mortgage relative to a subsequently recorded deed by the dates the instruments were *executed*. Presuming the "Acknowledged" date is the standard for when the instrument was executed, so if it is shown it would control.

Do we need to require our abstracters to change their entries to show the acknowledgement date? This issue arises in a situation where the Mortgage was "Dated" after the Deed was "Dated" but "Filed" before the Deed.

**RESPONSE(S):** According to one person who used to work in an abstract office, the "Dated" information was always the date the individual executing the document signed the document, or purported to sign the document (assuming that someone hand wrote a date or typed a date into the document or on or near a signature line). So, if the document in the first paragraph gives a date, and then at the bottom it is signed, that date is the "Dated" date. If the deed has a date typed or written after "Dated:" by the signature lines, that date is used.

The Acknowledged date is the date the document was notarized (which can sometimes be different, and sometimes be the only date as the document is not dated). Further, as the rules for Notaries Public do not require them to witness the signature for an acknowledgment, only that the individual who executed the document appear before the notary and acknowledge that he or she signed the document, the date could be different and the notary's acknowledgment is valid.

The "Dated" date, if one exists, would be determinative, and could be relied upon without additional information to the contrary.

28. **Defective Deed in Fulfillment of Contract.**

**FACTS:** An abstract shows the following:

- a. Bill sells on contract to Tom in 1968. Subject property is Lot 6 and Lot 3, except that part of Lot 3 deeded to Mary.
- b. Bill dies in 1979. His Will provides that the residue of his estate goes to a bank as trustee for the benefit of Bill's wife. At her death, remainder goes to the same bank as trustee of a 1971 trust created by Bill.
- c. Bill's wife elects against the Will.
- d. The abstract does not show that bank was ever appointed as testamentary trustee, and the Will does not indicate that the trust is to be private or not judicially supervised.
- e. No clues are provided about how distribution of the estate was made. There is no receipt and waiver from bank as trustee of the testamentary trust (or the 1971 trust, for that matter), but there are receipts and waivers from wife and persons who presumably are residuary beneficiaries of the 1971 trust.
- f. In 1982, bank as trustee of the 1971 trust gives Tom a deed in fulfillment of the contract. The deed described Lot 6 only – no mention of exception. However, deed recites that it is in "full compliance and satisfaction" of the 1968 contract.
- g. Bill's wife died in 2002.
- h. Tom is now selling the subject property.

Two problems appear to be: First, The deed is fulfillment was from the wrong grantor. Second, the deed had an incomplete legal description.

**QUESTION:** Given the passage of time, is there any solution that does not involve a quiet title suit or engaging in the likely impossible task of tracking down heirs of remainder beneficiaries of the 1971 trust?

**RESPONSE(S):** What are the terms of the contract? Is there a date all payments are due by? If so, it could be treated like an ancient mortgage in that it can't be foreclosed upon (10 years after an absolute due date or 20 years after the date of filing if no due date is given in the contract). Chances are, the contract was required to be paid in full at least that long ago.

As the contract seller only has a personal property interest (like a mortgage holder), the expiration of their ability to foreclose would eliminate their title interest – thus placing title clearly in Tom free and clear of any interest of anyone associated with the contract sale.

29. **Sale of Real Estate by Municipality to an Entity Rather Than Individuals in Notice.**

**FACTS:** There is an assumption that three individuals formed an LLC for the purpose of developing land acquired by the city. Mortgages given to lenders financing the development list the three individuals in addition to the LLC as mortgagors. Although not shown in the abstract, the contract between the city and the buyers calls for a deed to the buyers or their assignees. This seems to support the deed to the LLC as an assignee of the individuals, although no assignment is of record in the abstract.

**QUESTION:** Would anyone object to title where a municipality sells land to an LLC when its published notice and city council resolutions identify the buyers as three named individuals? Is an affidavit setting forth the relationship between the individuals and the LLC required? Must the city go through the sale again to correct the resolutions and notice to show the LLC as the buyer?

**RESPONSE(S):** A quit claim deed from the three individuals containing assignment language, assigning their interest in the contract to the LLC could be obtained. The spouses, if any, of the three individuals would have to sign it.

If the city has authorized by resolution a deed to the three individuals and instead gave a deed to the LLC, the original authority for the deed to the three individuals is still effective. There should be no need to go through the municipal sale process if it was done correctly the first time. Ask the city for a deed to the three individuals. The owners can then convey the land to the LLC and title will be cleaned up.

Under Iowa Code § 364.7, there would be two resolutions. First, is a proposal to sell, and, it is published along with the notice of date, time and place of a public hearing on the proposal to sell. Then the public hearing is held, and a resolution is then made by the city council for final determination.

It would appear that if the resolution for proposal to sell names the three individuals, and the published notice has that resolution along with the notice of the hearing date, then the city making final determination could substitute the LLC as the named buyer. Some lawyers would not be concerned with the named buyer on the first resolution but would want to see the LLC as the named buyer on the second resolution.

If the second resolution still lists the three individuals as the buyers, you may have two options: (1) the easiest and cleanest, is to have the city give a deed to the three individuals and they immediately give a deed to the LLC, or (2) have the city do another resolution in effect revising the other second resolution. It would not be necessary to republish or hold another hearing.

See Title Standard 2.1.

30. **Marketable Title in an Abstract – Conveyance by a Municipality.**

**FACTS:** Client is buying a lot from a City in Iowa. The abstract of title showed the conveyance of the lot to the City. There is no showing in the abstract that the City has complied with Chapter 364.7 (resolutions, notice of hearing). The City has now complied with Chapter 364.7. The attorney for the City has taken the position that the abstract does not need to show compliance with Chapter 364.7 for the abstract to show marketable title in the City. He is also taking the position that the City does not need to record the resolutions, etc. either, but rather that the delivery of the documents along with the deed is sufficient. He is fully aware of Title Standard 2.1.

**QUESTION:** Who is responsible for paying the recording fees of the resolution, notice of hearing and related documents required by Iowa Code §364.7?

**RESPONSE(S):** The City of Des Moines does not record the notice and resolution approving a sale until the sale closes. The deed, authorizing resolution, and the notice of the hearing are all recorded together.

If the notice and authorizing resolution are recorded in advance of closing and the sale did not close (which sometimes happens), the City will have clouded the title to its own property.

The deed and a certified copy of the notice and authorizing resolution can be provided to the closing agent in advance of closing, to be recorded at closing. The City proceedings can be viewed similar to a lien release. A lien release would never be released for recording until the funds necessary to extinguish the lien are received and held in escrow.

\* \* \*

Whether a City has marketable title or not depends upon the conveyance to the City and the title history to that. The title opinion found marketable title was in the City. Title Standard 2.1 specifies what a **buyer** from a City must have for the **buyer** to obtain marketable title. When the City delivers its deed and the certified copies of the documents pursuant to Iowa Code Chapter 364, the City is providing the transfer documents necessary to pass marketable title to **the buyer**. It is not the City's duty to show marketable title in the buyer by any subsequent abstracting, nor the City's duty to pay for recording documents needed to prove the buyer's immediate marketable title.

Title Standard 2.1 and the applicable Iowa Code sections only require the City comply with certain requirements and deliver to the purchaser proof of compliance, together with the deed.

\* \* \*

Although local custom may have some influence, it probably depends primarily on the terms of the contract. If what is required is a conveyance of marketable title of record, then the documents should be recorded by the City. Concerning the abstract, again the terms of the contract would govern. If the requirement is that the abstract must reflect marketable title in the seller, then the seller should have the abstract updated to show as much as is necessary to reflect marketable title to the seller consistent with Iowa law. The abstract cannot show marketable title in the seller without the recording of documents.

\* \* \*

You have to have the resolution and the proof of publication. How it gets of record is dictated by the purchase agreement.

\* \* \*

If the expense of recording the deed is on the buyer, why not the expense of recording the resolutions? The issue is whether marketable title is in the City – which it is. The resolutions are required to show marketable title IN THE BUYER. On the other hand, it is not the buyer's fault the City needs to file the resolutions – much like the expenses of preparing and filing Trustee/Buyer affidavits. Or, for example, a buyer would not be expected to pay for recording documents to prove that John Doe has authority to sign a deed for XYZ Corp. The resolutions really apply to this "authority to sign" analogy.

\* \* \*

The attorney for the City has taken the position that the abstract does not need to show compliance with Chapter 364.7 for the abstract to show marketable title in the City. The key point is "show marketable title in the City"- that is, the City holds marketable title. In order to convey marketable title, the City must comply with the statute and the abstract must show such.

The City has complied with Chapter 364.7, not recorded the documents reflecting compliance, but is offering the documents of having complied with Chapter 364.7 for recording by the buyer.

This then becomes a matter of who is paying for the recording and what the purchase agreement was. In Des Moines, the City often deeds unused property such as abandoned alleys to the adjoining property owners under the condition of the adjoining property owners paying the costs associated, such as recording documents. The City is willing to comply with the statute but puts the cost burden on the purchaser. If the lot was sold by the City under a market

value situation and the purchase agreement is drafted in that context, and it has the normal language you might find in the Iowa Bar form offer and acceptance, the City would need to record the necessary documents to reflect their conveying marketable title. Failure to comply with the statute would render it non-marketable title, and the City would be under obligation to show compliance to show it is conveying marketable title. Similar analogy can be found in a probate sale. If there is not power of sale in the Will, the estate must obtain court order authorizing conveyance and that court proceeding must be included in the abstract at seller estate's expense.

\* \* \*

When our City deeds property, the City pays to record the documents necessary to comply with Iowa Code Section 364.7 and Title Standard 2.1. Often this occurs after closing, but they are recorded.

31. **Missing Date in Notarial Acknowledgement.**

**FACTS:** The abstract shows (and checking records confirms) the acknowledgment on a deed was left blank (i.e., "This instrument acknowledged before me on \_\_\_\_\_, 2003 . . . ") The rest of the deed and acknowledgement are in good order, including a date over the grantors' signatures.

**QUESTION:** What is the effect of the missing acknowledgment date? How would Iowa law treat a latent defect in an acknowledgement, such as the later discovered fact that the notary was not physically present at the time the seller signed the recorded deed?

**RESPONSE(S):** Some lawyers argued: Realistically, under Title Standard 1.1, who is out there that will object to or sue someone based on the missing date? This would pass under an inconsequential error, albeit one that would not exist in a perfect world. Title should be passed.

Marshall's Section 13.8(A-1) says the date of an acknowledgement is immaterial and a wrong date (no date?) does not invalidate the certificate.

A cursory search of other jurisdictions on the issue of defective notary (i.e., the notary not being present) shows there may be a problem in a bankruptcy context with avoidance of the mortgage. See Fisher v. Advanta Fin. Corp. (In re Fisher), CIVIL ACTION 03-CV-4666, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, 320 B.R. 52; 2005 U.S. Dist. LEXIS 884, January 20, 2005.

Other lawyers argued: Iowa Code § 558.20 states the acknowledgement on a conveyance shall conform with Chapter 9E. Chapter 9E provides for short forms (which replaced the old forms found in Section 558.39). Both the forms now in Chapter 9E and the forms formerly in Section 558.39 (which was repealed in 2004, but which was in effect in 2003) provided for the notary public to state what date the document was acknowledged. Accordingly, you have a defective acknowledgement, and you would need to cure that since 10 years have not lapsed (see Section 9E.9A).

An affidavit signed by the notary public stating on which date he or she notarized that particular document would cure the issue without the need of a corrected deed (assuming the notary public can be found).

An instance arose where a mortgage's notary block was not dated, and the mortgage company required the mortgage to be corrected and refiled for this very reason.

The acknowledgement should be cured. "A document shall not be deemed lawfully recorded, unless it has been previously acknowledged or proved in the manner prescribed in Chapter 9E . . ." Iowa Code § 558.42. Thus, the question is not whether the document can be held against the maker of the instrument, but rather whether the improperly recorded instrument will be deemed to be legal notice to the public for purposes of priority and the like. This issue would be particularly important in Iowa since our recording statute is a race/notice statute.

32. **Ejectment.**

**QUESTION:** Does an Iowa Code Chapter 646 action for ejectment contemplate that there is any formal notice served upon the unlawful possessor before the lawful owner serves an original notice and petition?

**RESPONSE(S):** One analogy to this would be the FED provision that allows eviction without notice where the party is a squatter.

See Iowa Code Chapter 648.

33. **Easement/Deeds.**

**FACTS:** A wife predeceased her husband leaving him a life estate in her ½ interest in three farms. Upon the husband's death, her ½ interest in Farm One was given to Child One; Farm Two was given to Child Two; Farm Three was given to Child Three. The three farms adjoined each other and the husband farmed the farms as one unit with Child Three.

Husband passed away and left his ½ share of Farm One to Child One, Farm Two to Child Two and Farm Three to Child Three.

The three children do not get along.

Child Two had numerous individuals record affidavits stating that there has always been an easement across Child One's property to her property.

Child Two does have access to her farm without traveling across Child One's farm, although it is not the best access. Access across Child One's real estate is easier. Child Three supports Child Two's position because he rents Child Two's farm.

The estate is ready to close. The attorney for Child One, upon doing research, does not believe there was ever an easement over the land owned by Child One.

There were no easements of record at the time of husband's death.

**QUESTION:** Can an owner of land give himself an easement?

**RESPONSE(S):** This might create an easement of necessity or a prescriptive easement. Black's defines a prescriptive easement as: "A right to use another's property which is not inconsistent with the owner's rights and which is acquired by use, open and notorious, adverse and continuous for the statutory period (e.g., twenty years)." You can test the validity of the asserted easement by sending a no trespass letter, then suing for \$1.00 in damages in small claims when there is a trespass (is there a right for treble damages –i.e., \$3.00?). Father/husband cannot create the prescriptive easement because his use was not adverse to himself and anyone else using the easement by consent was not adverse.

Child Two may be able to do a private condemnation under Chapter 6A. See Owens v. Brownlie, 610 N.W. 2d 860 (Iowa 2000). However, since there was an alternative access, there may be no grounds for private condemnation. The property in Owens v. Brownlie was landlocked.

The case law actually broadens this to "convenient" or "efficient" access or something to that effect. There was a case where access was available but it would have required the servient owner to spend a large sum of money to construct a bridge.

Since (1) you can't create an easement on your own land, (2) forcing an easement by necessity would require no other access and (3) allowing permissive use cannot ripen into adverse possession, what do you do now? Child One has the upper hand, but may have to spend some effort to establish his rights. If all else fails, Child One could file a quiet title action to establish ownership free of the claimed easement.

In order to close the estate, the executor could establish that Child One will need to take necessary effort to clear the easement. A court officer deed to Child One could be drafted, with language to protect the executor/estate to the effect it is being conveyed subject to the claim of easement but not affirming the claim.

Isn't the point of the Compiano (Campiano v. Jones, 269 N.W. 2d 459 (Iowa 1978)) case that you can create a declaration of restrictions that is like a contract that takes effect upon a subsequent conveyance of either the servient or benefited property. While restrictive covenants may be different from easements, declarations of easements are prepared on land to be platted. While the declaration of easement would have no effect on the land until a conveyance is made, the Compiano theory could be relied upon to establish the easement when the property is conveyed.

Iowa Code Section 564.2 imposes a very difficult burden upon any party seeking to establish an easement by adverse possession.

In response to the affidavits filed by Child Two, a notice pursuant to Iowa Code Section 564.4 could be filed identifying that the use of the pathway across Farm One has been and continues to be by permission and may continue by permission until such time as the owner of Farm One chooses to withdraw such permission.

The right to take property for public use is conferred by Iowa Code Section 6A.4(2), "Upon the owner or lessee of lands, which have no public or private way to the lands, for the purpose of providing a public way . . ."

The existence of some access, albeit inconvenient access, would seem to preclude private use of eminent domain powers to acquire a better access under Section 6A.4(2).

The legislature held a special session and overrode the Governor's veto of HF2351. The question arises, can agricultural land be condemned for this purpose with HF2351 being enacted? It would seem that such use of eminent domain is prohibited by the new Section 6A.22(2)(a)(3) under HF2351.

34. **Joint Tenancy.**

**FACTS:** Husband and wife purchased their home and received a deed in 1970. They took title as: "John and Jane, husband and wife". In 1983, the same deed was re-recorded with the additional underlined language added: "John and Jane, husband and wife, or survivor".

The wife died on April 12, 2005. No estate has been opened for the wife. The husband is now selling the home. The examining attorney is requiring an estate to be opened to transfer the undivided interest of the wife. He cites Marshall's paragraph 4.2(C) for his position that the second recording did not create a joint tenancy.

**QUESTION:** Was joint tenancy created with the recording of the second deed?

**RESPONSE(S):** One lawyer says, no. The re-recording of the deed did not create a joint tenancy with rights of survivorship title. See Iowa Code Chapter 557.15.

Another lawyer disagrees, citing Marshall 3.1(A-2), which states that using the word "survivor" converts the tenancy in common to a joint tenancy vesting full title in the surviving spouse. Therefore, opening the wife's estate is not required. However, there may be a concern with the altered deed as to whether the spouses consented to its re-recording with the additional language. An affidavit from the deed preparer may be necessary to convince the examining attorney that the parties intended to create a joint tenancy with full rights of survivorship.

This author's summary is as follows:

**Joint Tenancy.**

(1) **Creation:**

- (a) to Husband and Wife, as joint tenants with full rights of survivorship, and not as tenants in common.
- (b) to grantees as joint tenants with right of survivorship.
- (c) to grantees as joint tenants and not as tenants in common.
- (d) to A or B, either one or the survivor. In re Miller's Estate, 248 Iowa 19, 79 N.W. 2d 315 (1956).

(2) Insufficient to create a joint tenancy:

(a) to grantees jointly.

See Albright v. Winey, 226 Iowa 222, 284 N.W. 86 (1939).

(b) to grantees as joint tenants.

G.F. Madsen, Marshall's Iowa Title Opinions and Standards §3.1(A-2) (2d ed. 1978) p. 59.

(3) The presumption in favor of tenancy in common must be overcome.

(4) A contrary intent must be expressed.

(5) Joint tenancies are not limited to two persons.

(6) Iowa Code Section 557.15: "Conveyances to two or more in their own right create a tenancy in common, unless a contrary intent is expressed."

See also McNertney v. Kahler, 710 N.W. 2d 209 (Iowa 2006).

35. **Joint Tenancy.**

**FACTS:** Husband and Wife take title to property as joint tenants with full rights of survivorship. They enter into an installment contract to sell the property to vendees. The contract preserved the sellers' joint tenancy. The contract is subsequently rescinded by a Special Warranty Deed reconveying title to Husband and Wife without the joint tenancy language. Wife has died and we would like to avoid probating her estate if Husband now has title as surviving joint tenant.

**QUESTION:** Are Husband and Wife still joint tenants with full rights of survivorship, or has the contract rescission changed their ownership to tenancy in common?

**RESPONSE(S):** You could argue to the examining attorney that the deed put title back where it was as it was in lieu of forfeiture. If the surviving spouse is willing to hold title for five years, you could clear it with an affidavit (Title Standard 9.8).

\* \* \* \*

Iowa Code Section 557.15 states: "Conveyances to two or more in their own right create a tenancy in common, unless a contrary intent is expressed." In this situation, the Deed in Lieu of Forfeiture was not really a conveyance to Husband and Wife since the Buyers did not have legal title. Rather, it was essentially a release of the Buyers' rights under the contract to purchase. Since legal title still remained in Husband and Wife and they preserved their joint tenancy in the contract, they did not receive a conveyance of title.

If the Husband and Wife had served a Notice of Forfeiture that was not cured and completed the forfeiture paperwork, no conveyance from Buyers would be recognized since the forfeiture cancelled the contract. There should be no difference between the notice process and the deed in lieu of forfeiture process.

36. **Child Support Judgment Lien/Homestead.**

**FACTS:** Husband and first wife divorce. First wife obtains a judgment for child support. Husband remarries and buys a home with his second wife and they take title in joint tenancy. Husband dies. Second wife is now attempting to sell the property where no satisfaction or release has been filed. First wife cannot be located to sign a release.

**QUESTION:** Does the second wife need to go through the procedures in Iowa Code §624.23(2) to deal with the lien (see Title Standard 6.7) or will an affidavit by the second wife alleging that the property is a homestead be sufficient?

**RESPONSE(S):** Iowa Code §624.23(2) does not apply. See Iowa Code §561.21. See attachments.

E. Judgment Lien - Joint Tenancy Property.

Title Standards Committee Opinion No. 1996-55.

Date: September 24, 1996

**FACTS:**

On July 19, 1990, a joint tenancy deed between A and B is prepared and recorded. On August 24, 1995, A dies. The property is being sold in A's estate and the abstract is continued down to date for examination. The abstracter stopped his search as to A as of July 19, 1990, when the joint tenancy deed was recorded. A judgment lien was entered on July 20, 1990 against A ("C" judgment creditor). There is no levy of execution.

**CONSENSUS OF IOWA TITLE STANDARDS COMMITTEE:**

The real estate can't be sold in A's estate because on the death of A, B is the sole owner. See 1 Patton on Land Titles, 630 (2d ed. 1957); II American Law of Property, 10-11; III 637-638 (Casner ed. 1952); Suppl. - American Law of Property, 159-161 (Casner ed. 1977).

No search is required against a deceased joint tenant and C has no lien against the real estate. See Iowa Land Title Standard 9.9, Iowa Abstracting Standards, VIII (1994). [Note - We recognize abstracters often search up to the date of death of a deceased joint tenant but unless there has been a levy of execution and sale before the death of A, we do not think this is necessary and the Land Title Abstracting Standard is correct.] Frederick v. Shorman, 259 Iowa 1050, 147 N.W. 2d 478, 484 (1956); I Kurtz, Iowa Estates Sec. 11.2 (3<sup>rd</sup> ed. 1995).

**DISCLAIMER.** THE ABOVE OPINION REPRESENTS THE THINKING OF A CONSENSUS OF THE TITLE STANDARDS COMMITTEE OF THE IOWA STATE BAR ASSOCIATION AND IS NOT, NOR IS IT INTENDED TO BE, A TITLE STANDARD.

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C

Supreme Court of Iowa.

Larry BROWN and Darlene Beyerink, Executors of  
the Estate of Clarence Brown,  
Deceased; and Larry Brown and Darlene Beyerink  
and Leona Brown, Individually  
and as Devisees and Sole Beneficiaries Under the  
Last Will and Testament of  
Clarence Brown, Appellees,  
v.

Mary VONNAHME, Administrator of the Estate of  
Barbara Trecker, Deceased,  
Appellant,  
Dennis Trecker; Ted A. Langel; Clara J. Langel;  
Agristor Credit  
Corporation; and Prudential Insurance Company of  
America, Defendants.

No. 69439.

Jan. 18, 1984.

Judgment creditors in wrongful death action brought action to impress judgment lien on real property belonging to deceased judgment debtor. The District Court, Carroll County, Carl Baker, J., impressed a judgment lien on such property, and cross appeals were taken. The Supreme Court, McGiverin, P.J., held that: (1) judgment creditors' wrongful death judgment did not attach as a lien at any time on decedent's joint tenancy interest in homestead property, even though the homestead property had not been platted and recorded as such; (2) judgment creditors were not adversely affected by decedent's intentional misrepresentation, if any, as to extent of her debts in marriage dissolution proceeding which resulted in award to decedent of homestead property formerly held in joint tenancy with her husband, since such creditors were never entitled to any interest in the homestead property; (3) deletion of husband's interest in homestead property in dissolution decree was not fraudulent as against wife's judgment creditors, since such creditors held no judgment against husband, and even if they did, homestead interest could be transferred free and clear of debts; and (4) decedent's heirs, who received title to her fee simple interest in property when she died intestate, were indispensable parties to an action involving such property.

Reversed; cross appeal dismissed.

West Headnotes

[1] Homestead ⚡103  
202k103 Most Cited Cases

A judgment lien does not attach to property used and occupied as a homestead, regardless of whether such property has been platted and recorded as such. I.C.A. §§ 561.16, 624.23, 624.24.

[2] Appeal and Error ⚡781(6)  
30k781(6) Most Cited Cases

Issue of whether agreement to settle wrongful death judgment against decedent, which agreement supposedly gave judgment creditors the "equity" in nonhomestead 40 acres, had been entered into prior to dissolution of decedent's marriage, which dissolution awarded decedent's husband nonhomestead 40 acres, was moot and no longer a justiciable controversy, in view of an agreement entered into during course of appeal between judgment creditors and decedent's husband concerning their respective rights in the "equity" of such nonhomestead 40 acres.

[3] Judgment ⚡752  
228k752 Most Cited Cases

A judgment lien is a legal right based upon statutory authority. I.C.A. §§ 624.23, 624.24.

[4] Judgment ⚡779(1)  
228k779(1) Most Cited Cases

A judgment lien, which attaches to judgment debtor's real property, is limited to the extent of judgment debtor's interest in such property.

[5] Homestead ⚡46  
202k46 Most Cited Cases

Wrongful death judgment did not attach as a lien, at any time, on judgment debtor's joint tenancy interest in 40-acre homestead even though such homestead had not been platted and recorded as such, and even though, subsequent to the wrongful death judgment, dissolution decree awarded judgment debtor entire 40-acre homestead. I.C.A. § 561.16, 624.23, 624.24.

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[6] Divorce  $\hookrightarrow$ 254(2)  
134k254(2) Most Cited Cases

Judgment creditors were not adversely affected by judgment debtor's intentional misrepresentation, if any, of extent of her debts in marriage dissolution proceeding which resulted in award to judgment debtor of homestead property previously held in joint tenancy with husband, since such creditors were never entitled to any interest in the homestead property. I.C.A. §§ 561.16, 624.23, 624.24.

[7] Joint Tenancy  $\hookrightarrow$ 6  
226k6 Most Cited Cases

Joint tenant owns an undivided interest in the entire estate to which is attached the right of survivorship.

[8] Divorce  $\hookrightarrow$ 254(2)  
134k254(2) Most Cited Cases

Division of property during marriage dissolution which removed interest of husband in joint tenancy homestead property was not fraudulent as against judgment creditors of wife, since such creditors held judgment only against wife and not husband; even if such creditors held judgment against husband, homestead interest could be transferred free and clear of such debts. I.C.A. §§ 561.16, 624.23, 624.24.

[9] Homestead  $\hookrightarrow$ 110  
202k110 Most Cited Cases

Homestead interest can be transferred free and clear of grantor's debts.

[10] Homestead  $\hookrightarrow$ 158  
202k158 Most Cited Cases

Dissolution decree does not affect the exemption, from judgment liens, of homestead property which is awarded to one of the parties. I.C.A. § 561.16.

[11] Homestead  $\hookrightarrow$ 158  
202k158 Most Cited Cases

Absent judicial sale, homestead is shielded from creditors of both parties when dissolution decree awards such property to one of the parties, since purpose of homestead laws is to provide a margin of safety to the family, not only for benefit of the family, but for the public welfare and social benefit

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which accrues to state by having families secure in their homes. I.C.A. § 561.16.

[12] Executors and Administrators  $\hookrightarrow$ 438(5)  
162k438(5) Most Cited Cases

In action to determine judgment creditor's rights in property belonging to judgment debtor who died intestate, decedent's heirs, as titleholders of record in her real property, were indispensable parties, since such heirs, and not decedent's estate, received title to her fee simple interest in such property. I.C.A. § 633.350; Rules Civ.Proc., Rule 25(b).

\*446 Gary L. McMinimee of Wunschel, Eich & McMinimee, P.C., Carroll, for appellant.

Thomas L. McCullough of McCullough Law Firm, P.C., Sac City, and David E. Green of Green & Siemann, Carroll, for appellees.

Considered by McGIVERIN, P.J., and LARSON, SCHULTZ, CARTER and WOLLE, JJ.

McGIVERIN, Presiding Justice.

[1] Defendant administrator of the estate of Barbara Trecker, deceased, appeals, and plaintiffs cross appeal, from a ruling of the district court that impressed a judgment lien for plaintiffs upon an undivided one-half interest in an improved forty acre tract of land located in Carroll County which Barbara and Dennis Trecker formerly occupied as their homestead. The court's ruling was based impliedly on a finding that Barbara and Dennis Trecker fraudulently obtained a dissolution of their marriage for the purpose of putting their property beyond the reach of Barbara's judgment creditors. We conclude, on de novo review of this equity case, that plaintiffs, as judgment creditors, are not entitled to a judgment lien on, or any other interest in, the forty acre homestead. This result is based in part on the well settled law of Iowa that a judgment lien does not attach to property used and occupied as a homestead. Furthermore, we conclude that even if improper motives existed in the \*447 dissolution case, there could be no fraud on judgment creditors as to the homestead property because the creditors never were entitled to any interest in such property. Therefore, we reverse the district court ruling.

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The forty acres involved in this dispute, along with an additional forty acre tract, were deeded to Barbara and Dennis Trecker, as joint tenants with right of survivorship, in 1968. Barbara and Dennis, as husband and wife, and their children then established their home on this property.

In 1976, Clarence Brown died as a result of an auto-pedestrian accident in which he was struck by a car driven by Michael Trecker and owned by his mother, Barbara Trecker. Neither Michael nor Barbara had any liability insurance on the auto.

In 1977, the plaintiffs in this case, as executors and devisees of Brown, brought a wrongful death action against Barbara and Michael Trecker. Barbara's husband, Dennis, was not made a party to that action. Judgment was entered against Barbara and Michael, on May 12, 1978, in the sum of \$106,222.68 plus interest at the rate of seven percent from May 12, 1978, and also for punitive damages against Michael in the sum of \$25,000.00 plus interest at the rate of seven percent from May 12, 1978, for damages caused by the wrongful death of Clarence Brown. No judgment was sought or entered against Dennis Trecker. This judgment was properly indexed and recorded by the Carroll County Clerk of Court.

At the time judgment was entered, the Treckers' eighty acres were encumbered by a first mortgage held by Prudential Life Insurance Company of America in the principal sum of \$18,000 and a second mortgage held by Agristor Credit Corporation in the principal sum of approximately \$12,000. In addition, Ted and Clara Langel purportedly held an option to purchase the eighty acres for \$650 per acre. This alleged option was subsequently found by this court to be a preemption agreement that was invalid because it placed an unreasonable restraint on alienation. See *Trecker v. Langel*, 298 N.W.2d 289 (Iowa 1980).

Following the entry of the wrongful death judgment, the parties' attorneys entered into negotiations attempting to settle the judgment. A series of letters were exchanged, but a written negotiated settlement document was never signed. Plaintiffs did not pursue execution and levy on the eighty acres in their efforts to collect their wrongful death judgment. They were aware of the two mortgages and the litigation attempting to determine the validity of the Langel "option to purchase."

On December 20, 1979, Barbara Trecker amended a separate maintenance action she had filed on February 8, 1977, and sought a dissolution of her marriage with Dennis Trecker. The judgment arising out of the wrongful death action was not set forth by either party in financial affidavits, nor did either party inform the court of the existence of this judgment during the course of the proceedings. After trial, the court on January 7, 1980, entered a decree dissolving the Trecker marriage. Barbara was awarded custody of their minor children. The decree also provided for a property division in which Barbara received the forty acre homestead tract subject to the Prudential and Agristor mortgages and Dennis received the unimproved forty acres "free and clear of any liens." None of the Treckers' creditors were before the court during the dissolution proceedings.

Plaintiffs, thereafter, filed this action in equity, pursuant to Iowa Code sections 630.16-.19 (1977), asserting a judgment lien on the entire eighty acres notwithstanding the dissolution decree's property division. Plaintiffs alleged that the dissolution of the Trecker marriage was pursued by the Treckers with fraudulent intent to place their property beyond the reach of their creditors and that Barbara's estate is estopped from claiming that the plaintiffs do not have an enforceable judgment lien on the entire eighty acres based on the doctrines of promissory and equitable estoppel.

\*448 On August 17, 1980, Barbara Trecker died intestate before trial of the present case. Plaintiffs substituted the administrator of Barbara's estate as a party in her place. Iowa Code § 611.22 (1981).

After trial, the trial court held on October 25, 1982, that a judgment lien does not attach to a joint tenant's interest in property until a severance has occurred; that an agreement had never been reached between the parties for settlement of plaintiffs' wrongful death judgment and that the theory of promissory estoppel had not been established; and held by implication that the concealment of the outstanding wrongful death judgment from the dissolution court was fraudulent, therefore entitling the plaintiffs to a lien against one-half of the forty acre tract then "owned by the estate of Barbara Trecker" and a lien against one-half of the forty acre tract then owned by Dennis Trecker.

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Barbara's estate appealed and plaintiffs cross appealed. Dennis Trecker, Prudential, Agristor, and the Langels are not now parties to this appeal. Therefore, this appeal is concerned only with the rights of the parties now before us in the forty acre homestead.

[2] I. *Plaintiffs' cross appeal.* Plaintiffs' cross appeal is moot. They contend that an agreement to settle the wrongful death judgment against Barbara had been entered into by the Treckers and themselves prior to the dissolution of the Trecker marriage. The terms of this alleged settlement supposedly gave plaintiffs the "equity" in the non-homestead forty acres that remained after paying off the Prudential and Agristor mortgages. However, this cross appeal is no longer a justiciable controversy in view of an agreement entered into during the course of this appeal between plaintiffs and Dennis Trecker concerning their respective rights in the equity of the non-homestead forty acres that was awarded to Dennis by the dissolution decree. The agreement between plaintiffs and Dennis was brought to our attention by appellee's counsel in oral argument. The non-homestead forty acres is, accordingly, no longer an issue in the case. We, therefore, dismiss plaintiffs' cross-appeal as moot based on its failure to present a justiciable controversy. In view of this disposition, it is unnecessary to rule on a motion by the administrator of Barbara's estate to dismiss plaintiffs' cross-appeal.

II. *Attachment of judgment lien.* An important issue necessary for the determination of the parties' respective rights and interests in the forty acre homestead involves the question of when, if ever, a judgment lien attaches to a judgment debtor's interest in real property used and occupied as a homestead and held in joint tenancy with right of survivorship.

Relying upon *Eastern Shore Building & Loan Corp. v. Bank of Somerset*, 253 Md. 525, 253 A.2d 367 (1969), the trial court held that a judgment lien does not attach to a judgment debtor's joint tenancy interest in real property until such interest has been severed and a tenancy in common arises. We need not look beyond the law of this state, however, for authority to answer this question.

[3] It is well established that a judgment lien is a legal right based upon statutory authority:

Judgments are not, of themselves, liens upon property. A lien predicated upon the rendition or entry of judgment did not exist at common law.

It arose from the right, granted by statutes enacted in early times, to take out an elegit or to subject the property to seizure and sale upon execution. Consequently, *such liens are creatures of statutory provisions*, owe their life and force entirely to legislation, and do not exist except by its authority.

46 Am.Jur.2d *Judgments* § 238 (1969) (emphasis added). See also 49 C.J.S. *Judgments* § 454 (1947); 10A Thompson on Real Property § 5304 (1957).

Iowa law provides for judgment liens in Iowa Code section 624.23 (1977):

Judgments in the appellate or district courts of this state, or in the circuit or district court of the United States within \*449 the state, *are liens upon the real estate owned by the defendant at the time of such rendition*, and also upon all he [or she] may subsequently acquire, for the period of ten years from the date of the judgment.

(Emphasis added.) Section 624.24 then specifically provides the time frame for the attachment of a judgment lien:

When the real estate lies in the county wherein the judgment of the district court of this state or of the circuit or district courts of the United States was entered in the judgment docket and lien index kept by the clerk of the court having jurisdiction, *the lien shall attach from the date of such entry of judgment*, but if in another it will not attach until an attested copy of the judgment is filed in the office of the clerk of the district court of the county in which the real estate lies.

(Emphasis added.) The Code clearly directs that a judgment lien will attach to the judgment debtor's real estate on the date such judgment is entered, provided the real estate lies in the county wherein the judgment was entered in the judgment docket and lien index. The Code further provides that the judgment lien will attach to all subsequently acquired real property.

[4] The judgment lien is limited to the extent of the judgment debtor's interest in the real property.

The lien of a judgment attaches to the precise interest or estate which the judgment debtor has

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actually and effectively in the property, and only on such interest; the lien cannot be made effectual to bind or to convey any greater or other estate than the debtor himself, in the exercise of his rights, could voluntarily have transferred or alienated....

49 C.J.S. *Judgments* § 478(a) (1947). See *Richardson v. Estle*, 214 Iowa 1007, 1016, 243 N.W. 611, 615 (1932); *Johnson v. Smith*, 210 Iowa 591, 595, 231 N.W. 470, 473 (1930).

This court, however, has long recognized an important exception to the rules in sections 624.23-24 when homestead realty is involved. [FN1] In that situation, we have construed Iowa Code section 561.16 with sections 624.23-24.

FN1. Our analysis is based on the statutes and decisions in effect at the time the facts occurred in this case. We do not pass on the effect of 1982 Iowa Acts ch. 1002, effective January 1, 1983, which now appears as Iowa Code section 624.23(2)-(3) (1983), because it was not in effect at times material to this case.

Beginning with *Lamb v. Shays*, 14 Iowa 567 (1863), this court has consistently held that a judgment lien does not attach to real property used and occupied as a homestead regardless of whether the homestead has been platted and recorded as such. The rationale behind this exception was stated in *Lamb* as follows:

Section 4105 of the Revision of 1860 [accord Iowa Code section 624.23], provides that judgments in the Supreme or District Courts of this State are liens upon the real estate owned by the defendant at the time of such rendition. Section 3247 provides the manner for enforcing a judgment, that is, by execution. A lien therefore that cannot be enforced by execution is inoperative and of no practical effect or benefit to the holder thereof. Section 2277 [accord section 561.16] provides that when there is no special [declaration] of the Statute to the contrary, the homestead of every head of a family is exempt from judicial sale. The law in relation to the homestead exemption is silent as to the effect of a judgment lien. The section in relation to the liens of judgments of the Supreme and District

Court, and the one giving to the owner of the homestead the exemption, were passed by the Legislature at the same time, the one giving to the judgment creditor a lien on all lands of the defendant and the other denying him the right to enforce it so far as the homestead is concerned. The right of the judgment creditor to seize or to enforce his judgment by selling the lands of the debtor, exists only by force of the statute and is regulated altogether by its provisions. \*450 The lien of a judgment upon lands in this state being conferred by statute, it can only have such force as is given thereby, and it can only attach or become effective in the manner, at the time, and upon the conditions and limitations imposed by the statute itself. A lien without the power to enforce it carries with it no advantage to the owner thereof. It cannot be enforced as against the homestead, because it is exempt from judicial sale. It is inoperative, and cannot be otherwise, as long as the homestead is used as a home. Construing the two sections together, having been passed at the same time by the Legislature, we think that it could not have been designed that the lien should ever attach upon property that was declared exempt from judicial sale.

*Id.* at 569-70.

In *Mitchell v. West*, 93 N.W. 380 (Iowa 1903), this court for the first time explicitly held that the homestead exemption from judgment liens was not premised upon formal platting and recording of the homestead. We stated:

The fact that the homestead was not platted or otherwise specifically designated as such can make no difference in its character, because it was the *actual occupancy* thereof which created the homestead.... A judgment does not attach as a lien on the homestead while it is so occupied and used....

*Id.* at 381 (emphasis added). See also *American Savings Bank of Marengo v. Willenbrock*, 209 Iowa 250, 228 N.W. 295 (1929) (creditor not entitled to a judgment lien on debtor's homestead notwithstanding fact that homestead was not platted when judgment was entered); *Citizens' Savings Bank of Olin v. Glick*, 134 Iowa 323, 327-28, 111 N.W. 970, 972 (1907) (platting not necessary to prevent the attachment of a judgment lien to a homestead).

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It is undisputed that at the time judgment was entered against Barbara Trecker on May 12, 1978, she and her then husband, Dennis Trecker, were actually occupying the forty acre tract at issue here as their home although it had not been platted as a homestead.

[5] We conclude, therefore, that plaintiffs' wrongful death judgment did not attach as a lien at any time on Barbara's joint tenancy interest in the forty acre homestead even though it had not been platted and recorded as such.

III. *Trial court's decree.* Having determined as a matter of law that plaintiffs are not entitled to a judgment lien on the homestead, we now review de novo the trial court's decree. The trial court impressed a judgment lien on an undivided one-half interest in the forty acre homestead to remedy the alleged fraudulently conspired dissolution of marriage.

The trial court's decree was based impliedly on a finding that the Treckers proceeded with the dissolution of their marriage for the purpose and intention of committing a fraud on plaintiffs and other creditors. The court then impressed a judgment lien on the homestead relying on the authority of *In re Marriage of Tierney*, 263 N.W.2d 533, 535 (Iowa 1978). That case held that a dissolution court has the power to provide for the sale of the homestead to pay debts of the parties because Iowa Code section 598.21, providing for dispositional orders in dissolution proceedings, is a "special declaration of statute to the contrary" of the general homestead exemption found in section 561.16.

[6] We reverse the trial court decree. Even if the Treckers intentionally misrepresented the extent of their debts in the dissolution proceeding, the plaintiffs and other creditors were not adversely affected because they were never entitled to any interest in the homestead property. We held in division II that a judgment lien did not attach to the forty acre homestead at any time by force of statute. Thus, at the time the dissolution decree was entered, the plaintiffs did not have any interest in the forty acre homestead as a result of their wrongful death judgment.

\*451 [7] As stated before, Barbara and Dennis held the eighty acres, including the forty acre homestead,

in joint tenancy.

We have described the estate of joint tenancy as:

An estate held by two or more persons jointly with equal rights to share in its enjoyment during their lives and having as its distinguishing feature the right of survivorship.

*In re Estate of Winkler*, 232 Iowa 930, 933, 5 N.W.2d 153, 155 (1942). Thus, a joint tenant owns an undivided interest in the entire estate to which is attached the right of survivorship.

[8][9] The dissolution court in dividing the property merely removed any interest Dennis had in the homestead property. This deletion of Dennis's interest in the homestead property could not be fraudulent because plaintiffs held no judgment against Dennis, and even if they did, it is well settled in Iowa that a homestead interest can be transferred free and clear of the grantor's debts. *Delashmut v. Trau*, 44 Iowa 613, 616 (1876) (a voluntary conveyance of the homestead by its owner, even when made with a fraudulent intent, vests the title absolutely in the grantee, and it does not become subject to the lien of a judgment previously obtained against the grantee); *Beyer v. Thoeming*, 81 Iowa 517, 519, 46 N.W. 1074, 1075 (1890) (husband could not defraud his creditors by conveying the homestead to his wife, nor to any other person, because creditors had no right to subject it to the payment of any debts contracted after the homestead right attached); *Mitchell v. West*, 93 N.W. at 381 (a conveyance of a homestead transfers a title free from liens against the grantor).

[10] Furthermore, a dissolution decree does not affect the exemption of homestead property that is awarded to one of the parties. Iowa Code section 561.16 provides that the right to the homestead exemption "shall continue in favor of the party to whom it is adjudged by divorce decree during continued personal occupancy by such party."

[11] Therefore, absent judicial sale, the homestead is shielded from the creditors of both parties when the dissolution decree awards such property to one of the parties. This result is in harmony with the stated public policy for the State of Iowa that the purpose of the homestead laws is "to provide a margin of safety to the family, not only for the benefit of the family, but for the public welfare and social benefit which accrues to the State by having

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families secure in their homes." *In re Marriage of Tierney*, 263 N.W.2d at 534.

Based on these reasons, we hold that plaintiffs cannot prevail on a claim that the dissolution of the Trecker marriage was fraudulently entered into for the purpose of defeating their interest in the homestead property because plaintiffs never acquired any interest in such homestead property and, therefore, they were not harmed by the dissolution court's property division. Accordingly, we reverse the decree of the trial court.

[12] IV. *Indispensable parties*. We find merit in the contention of the administrator of Barbara's estate that the trial court's judgment was ineffective between the parties because of plaintiffs' failure to join the heirs of Barbara Trecker who were indispensable parties to this action. Iowa Code section 633.350 (1979) provides in substance that title to a decedent's property passes directly to the beneficiaries of heirs of the decedent. Therefore, when Barbara Trecker died intestate, her heirs, and not her estate, received the title to her fee simple interest in the improved forty acres. *See DeLong v. Scott*, 217 N.W.2d 635, 637 (Iowa 1974). We conclude that Barbara Trecker's heirs, as title holders of record in the improved forty acres, were indispensable parties within the meaning of Iowa R.Civ.P. 25(b). However, this is no longer a controlling question for this appeal in view of our disposition of the case.

Based on our findings that plaintiffs' wrongful death judgment did not attach as a lien to Barbara Trecker's interest in the Treckers' forty acre homestead and that no fraud was committed on plaintiffs as judgment \*452 creditors with respect to the dissolution court's decree awarding the forty acre homestead to Barbara, we reverse the decree of the trial court.

REVERSED ON THE APPEAL; CROSS  
APPEAL DISMISSED.

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END OF DOCUMENT

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(Cite as: 387 N.W.2d 313)

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C

Supreme Court of Iowa.

Lorna M. REMBE, Executor of the Estate of Verna  
M. Chappell, Deceased,  
Appellant,

v.

Bertha M. STEWART and Bruce Godbersen,  
Appellees.

No. 85-1061.

May 21, 1986.

Executor of estate sought to have joint tenancy property of deceased included in estate in order to provide assets to pay debts which were otherwise unpayable. The District Court, Woodbury County, Dewie J., Gaul, J., entered summary judgment against executor, and she appealed. The Supreme Court, Harris, J., held that the long-standing rule that surviving joint tenant takes real property free of debts of deceased joint tenant applied and would not be changed absent legislative action.

Affirmed.

West Headnotes

Joint Tenancy ¶12  
226k12 Most Cited Cases

Surviving joint tenant took real property free of debts of deceased joint tenant, even though deceased joint tenant's remaining estate was inadequate to cover debts, absent showing property was transferred with intent to defraud creditors. I.C.A. § 633.368.

\*313 Daniel D. Dykstra and John C. Gray of Eidsmoe, Heidman, Redmond, Fredregill, Patterson & Schatz, Sioux City, for appellant.

Harry H. Smith and Dennis M. McElwain, Sioux City, for appellees.

Considered by REYNOLDS, C.J., and HARRIS, CARTER, WOLLE, and LAVORATO, JJ.

HARRIS, Justice.

This appeal invites us, on public policy grounds, to change a longstanding rule concerning property held in joint tenancy. We decline in the belief that any such change should be by statute.

The general rule that a surviving joint tenant takes real property free of the debts of the deceased joint tenant appears to be well-settled, at least in most jurisdictions. See 48A C.J.S. *Joint Tenancy* § 3 (1981) ("[O]n the death of a joint tenant the survivor or survivors take the whole estate, free from the claims of the heirs or creditors of the deceased cotenant."); 20 Am.Jur.2d *Cotenancy and Joint Ownership* § 3 (1965). Our cases are in accord with the general rule. See *Frederick v. Shorman*, 259 Iowa 1050, 1060, 147 N.W.2d 478, 484 (1966) ("We agree a joint tenant's creditors can, by proper action brought before the joint tenant's death, reach the interest or title to the property held in joint tenancy. Of course, such interest cannot be reached after the joint tenant's death."); *Wernet v. Jurgensen*, 241 Iowa 833, 837, 43 N.W.2d 194, 197 (1950); *Wood v. Logue*, 167 Iowa 436, 441, 149 N.W. 613, 615 (1914); see also *Estate of Awtry v. Commissioner*, 221 F.2d 749, 753 (8th Cir.1955) (applying Iowa law); Hines, *Real Property Joint Tenancies: Law, Fact, and Fancy*, 51 Iowa L.Rev. 582, 597 (1966) ("[An] advantage of joint tenancy directly attributable to the peculiar operation of the survivorship right is the potentiality for avoiding creditors' claims. Neither unsecured creditors nor secured creditors of a deceased joint tenant can reach the joint tenancy property in the hands of the survivor unless a severance of the tenancy was effected before the debtor joint tenant's demise.").

\*314 The plaintiff acknowledges this is the general rule in Iowa but urges us to recognize an exception. She thinks that, when probate assets are insufficient to pay claims made against an estate, property held by a surviving joint tenant should be made available to satisfy them. She thinks our cases indicate a movement toward recognizing such an exception and believes public policy considerations favor it.

The facts here make a poor vehicle for such a change. Plaintiff had been Verna M. Chappell's conservator for many years prior to her death in 1981 and was named as executor of her estate. At the time of her death Verna owned real estate in

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joint tenancy with her niece, defendant Bertha M. Stewart, pursuant to a warranty deed executed on June 16, 1965. According to an affidavit filed by defendant for inheritance tax purposes, Verna transferred the property to herself and her defendant niece as joint tenants in exchange for defendant's promise to care for Verna:

[Verna] took me to her lawyer in Ponca, Nebraska, and explained to him that she wanted the property ... to be my sole property since she intended to lean heavily on my husband and [me] for care in her remaining years and this was the only way she could pay us.

After Verna died, defendant Bruce Godbersen purchased the property from Bertha for \$26,750.

Verna's gross estate for inheritance tax purposes was set at \$28,321.21. Claims, debts, and charges against the estate totaled \$19,451.71. The probate assets available to pay them came to only \$1,571.21. As a result \$17,880.50 remained unpaid. Plaintiff claimed her total expenses as conservator came to \$14,040, the largest claim against the estate. Plaintiff then brought this action requesting that the property Verna held in joint tenancy with Bertha be transferred to her as executor "for purposes of payment of claims, debts, and charges...." In the alternative she asked the court to assign the contract between Bertha and defendant Godbersen to the estate for payment of claims. Ruling on a summary judgment motion, the trial court rejected plaintiff's request and this appeal followed.

We deny any trend in our cases deviating from the established rule. Plaintiff points to dicta *In re Estate of Stamets*, 260 Iowa 93, 148 N.W.2d 468 (1967), in which we affirmed a trial court decree requiring a surviving joint tenant of a bank account to pay funeral expenses of the deceased joint tenant. But the provision in the decree merely enforced an agreement. We noted:

We may observe that Lena offered at the outset of the trial, in the event the ... account were awarded to her, to pay the only claim against decedent's estate of \$1665.95 for funeral and burial expense.

The decree requires her to do this and to pay the state inheritance tax on what passes to her.

*Id.* at 102, 148 N.W.2d at 474.

We find no cases which bear out plaintiff's belief

that the *Stamets* dicta presaged a shift in our established rule. *Petersen v. Carstensen*, 249 N.W.2d 622 (Iowa 1977), like *Stamets* (and unlike the present case), involved a joint tenancy in a bank deposit. We held the deposit belonged to the surviving joint tenant, not the estate of the deceased joint tenant. *Id.* at 625. We did not directly consider whether the property belonging to the surviving tenant could be subject to the claims of the deceased tenant's creditors but our opinion indicates no change in the general rule outlined in our earlier cases. [FN1]

FN1. Iowa Code section 633.368 (1985) provides for the recovery by the personal representative of an estate of property transferred with intent to defraud creditors.

There is no claim of fraud here and the section is not involved in this appeal.

Plaintiff's strongest contention is based on public policy reasons for changing the rule, though to urge them she has to borrow from facts not her own. She argues that the rule

presents an opportunity [for a decedent] to defraud the creditors. If a person anticipates that significant claims, charges and debts will be presented in \*315 his estate, he can thwart his creditors by putting his property in a joint tenancy prior to his death.

Even if the decedent possessed no fraudulent intent, plaintiff contends, "creditors can be put at an unfair disadvantage because the decedent can transfer property that would otherwise be available to pay the expenses of a decedent's last illness." She argues such a result "is unfair to creditors who advance goods and services on the reasonable expectation that they would be paid out of the assets of the estate."

Plaintiff does not however claim fraud and, as Verna's long-time conservator, is in no position to contend she contributed those services in ignorance of Verna's property interests, or served only because of her mistaken belief that those interests were greater than they proved to be.

Even so she can point to persuasive policy arguments for changing the general rule. One highly respected Iowa commentator appears to

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agree:

[The general rule] is particularly harsh on the creditor holding a lien on the property good against only one of the joint tenants. If the debtor tenant is the first to die the lien is lost.

The vulnerability of the creditor whose apparently affluent debtor owns all of his property subject to survivorship rights is a facet of joint tenancy that has generated some concern in recent years. Strangely, laymen seem little aware of this seemingly important attribute of joint tenancy. If the desirability of the joint tenancy form would be only mildly weakened by removing this feature, perhaps, in the interest of fair dealing, creditors with liens should be permitted to follow unexempt joint tenancy property into the hands of the survivor, at least to the extent they could have reached the deceased debtor's interest in the property during his life.

Hines, *supra*, at 597.

Whatever the merits of the proposed change, we fear that, if it were to occur by judicial fiat, the cure might be worse than the disease. Joint tenancies are already fraught with dangerous and often expensive problems and to add to them might not be worth any advantages gained by the change. Experience has clearly taught that even the most careful estate plan is subject to shipwreck upon the treacherous reef of a stray joint tenancy deed. Joint tenancies have multiplied countless problems relating to death taxes in the estates of the unwary. It may be that the policies mentioned would justify the proposed change. But the additional litigation necessary to sort through claims such as this one, and in settling the real estate titles that might be compromised also have to be weighed in the balance.

We think the weighing of these and other conflicting considerations is more appropriate for the legislative than for the judicial process. We decline to change our rule.

AFFIRMED.

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**C**

Court of Appeals of Iowa.

In the Matter of the ESTATE OF Tim H. BATES, Jr.,  
Deceased.

Roberta B. BATES, Appellant,

v.

Tim H. BATES, III, Fiduciary of the Estate of Tim  
H. Bates, Jr., Deceased,  
Appellee.

No. 91-645.

Sept. 29, 1992.

Former wife made claim against former husband's estate. Estate counterclaimed seeking declaratory judgment that it owned one-half interest in former marital residence. The District Court, Scott County, Margaret S. Briles, J., entered declaratory judgment in favor of estate on counterclaim, and former wife appealed. The Court of Appeals, Habhab, J., held that parties' stipulation, adopted in dissolution decree, to sell home and divide proceeds resulted in severance of joint tenancy, even though property was never sold.

Affirmed.

West Headnotes

**[1] Executors and Administrators** ⚙️85(1)  
162k85(1) Most Cited Cases

Action in probate to determine ownership of property is triable as in equity.

**[2] Appeal and Error** ⚙️893(2)  
30k893(2) Most Cited Cases

**[2] Executors and Administrators** ⚙️85(8)  
162k85(8) Most Cited Cases

Supreme Court's review is de novo in action in probate to determine ownership of property.

**[3] Appeal and Error** ⚙️1009(1)  
30k1009(1) Most Cited Cases

**[3] Executors and Administrators** ⚙️85(8)  
162k85(8) Most Cited Cases

In reviewing action in probate to determine

ownership of property, Supreme Court gives weight to trial court's findings, but is not bound by them.

**[4] Joint Tenancy** ⚙️1  
226k1 Most Cited Cases

**[4] Joint Tenancy** ⚙️6  
226k6 Most Cited Cases

Estate of joint tenancy is estate held by two or more persons jointly with equal rights to share in its enjoyment during their lives and having as its distinguishing feature right of survivorship; thus, joint tenant owns undivided interest in entire estate to which is attached right of survivorship.

**[5] Joint Tenancy** ⚙️4  
226k4 Most Cited Cases

Joint tenants may sever joint tenancy by mutual agreement.

**[6] Joint Tenancy** ⚙️4  
226k4 Most Cited Cases

Severance of joint tenancy results when contract for sale of real estate is entered into by joint tenants.

**[7] Joint Tenancy** ⚙️5  
226k5 Most Cited Cases

Conveyance by one party may terminate joint tenancy.

**[8] Joint Tenancy** ⚙️4  
226k4 Most Cited Cases

Involuntary conveyance or seizure of interest of joint tenant will sever joint tenancy.

**[9] Husband and Wife** ⚙️14.2(5)  
205k14.2(5) Most Cited Cases

**[9] Joint Tenancy** ⚙️4  
226k4 Most Cited Cases

Stipulation, adopted in dissolution decree, in which husband and wife agreed to sell home and divide proceeds resulted in severance of joint tenancy, even though property was never sold.

\*705 Mark S. Dickhute and Nancy Lawler Dickhute, Omaha, Neb., and Stephen W. Ruth, Davenport, for appellant.

Rex J. Ridenour of Dircks, Ridenour, Norman &

Macek, Davenport, for appellee.

Considered by OXBERGER, C.J., and  
DONIELSON and HABHAB, JJ.

HABHAB, Judge.

Roberta Bates and Tim H. Bates, Jr. were formerly married to each other. During the marriage they purchased a house as joint tenants, with right of survivorship.

In 1979 the marriage was dissolved. The parties entered into a stipulation concerning the distribution of property. The dissolution decree adopted the stipulation. The decree provided:

The petitioner [Roberta] shall be given possession of the homestead presently held in joint tenancy and that said homestead shall be placed on the real estate market for sale not later than the 15th day of January 1980. That all proceeds from the sale of the homestead shall be divided equally among the parties after deducting the mortgage on said homestead estimated at approximately \$16,000 and any costs necessitated by said sale....

Following the dissolution decree the house was placed on the market, but was never sold. Roberta retained possession of the house.

Tim died in 1989. Roberta made a claim against the estate for unpaid alimony, but later dropped the claim. The estate filed a counterclaim seeking a declaratory judgment that it owned a one-half interest in the former marital residence. The case then proceeded solely on the estate's counterclaim.

The district court entered a declaratory judgment favorable to the estate. The district court held that the 1979 dissolution decree severed the previous joint tenancy and converted the ownership of the house to a tenancy in common. Thus, because there is no right of survivorship in a tenancy in common, Tim's interest in the house survived his death and passed to his estate.

Roberta has appealed from the district court's declaratory judgment.

[1][2][3] An action in probate to determine the ownership of property is triable as in \*706 equity. *In re Estate of Sheimo*, 261 Iowa 775, 778, 156 N.W.2d 681, 683 (1968). Therefore, our review is de novo.

*See In re Estate of Lemke*, 216 N.W.2d 186, 189 (Iowa 1974). We give weight to the trial court's findings, but are not bound by them. *Id.*

Roberta contends that because the dissolution decree did not specifically sever the joint tenancy, it continued until Tim's death, when she acquired the entire estate as the survivor. She claims an unequivocal expression of intent to sever is needed to terminate a joint tenancy.

[4] The estate of joint tenancy is an estate held by two or more persons jointly with equal rights to share in its enjoyment during their lives and having as its distinguishing feature the right of survivorship. *Brown v. Vonnahme*, 343 N.W.2d 445, 451 (Iowa 1984). Thus, a joint tenant owns an undivided interest in the entire estate to which is attached the right of survivorship.

Iowa does not follow the "four unities" common law rule, which required a unity of time, title, possession, and interest in order to create (and continue) a joint tenancy. *In re Estate of Baker*, 247 Iowa 1380, 1384, 78 N.W.2d 863, 865 (1956). Under this rule, any act of a joint tenant which destroys either of these unities operates as a severance of the joint tenancy and extinguishes the right of survivorship. In Iowa the intent of the parties prevails. *Id.*

[5][6][7][8] Joint tenants may sever a joint tenancy by mutual agreement. *Id.*, 78 N.W.2d at 867. In addition, a severance of a joint tenancy results when a contract for the sale of real estate is entered into by the joint tenants. *Id.*, 78 N.W.2d at 868. Further, a conveyance by one of the parties may also terminate a joint tenancy, *Keokuk Sav. Bank & Trust Co. v. Desvaux*, 259 Iowa 387, 392, 143 N.W.2d 296, 299 (1966). The involuntary conveyance or seizure of the interest of a joint tenant will sever the joint tenancy. *Frederick v. Shorman*, 259 Iowa 1050, 1059-60, 147 N.W.2d 478, 484 (1966).

The Iowa Supreme Court in *In re Baker's Estate*, 247 Iowa 1380, 78 N.W.2d 863, 867 (1956), cited with approval the following statement from Note, *Legal Consequences of the Severance of a Joint Tenancy*, 32 Iowa L.Rev. 539, 541 (1947):

A conversion of the joint tenancy into a tenancy in common may be effected by the concerted action of all joint tenants as well as by the act of one or less than all of them. Conduct or mutual agreement between joint tenants making disposition of the property may convert the joint tenancy into a tenancy in common, even though such conversion was un contemplated.

Our supreme court in *Baker* further noted in particular two cases that supported the foregoing statement, *Re Wilford's Estate*, 11 Ch.Div. 267 (1879), and *In the Estate of Heys*, [1914], p. 192. In each of these cases, there is a holding that an agreement to make mutual wills was sufficient to effect a conversion of the joint tenancy into a tenancy in common. The Iowa Supreme Court then held at page 867:

If an agreement to make mutual wills effects a conversion with equal logic it can be said the same effect will result from a sale of all the interest of the parties to a joint tenancy by reason of a contract of sale.

[9] There are no Iowa cases which directly address the issue before us— whether an agreement by the joint tenants to sell the property will sever a joint tenancy, if the property is never actually sold. We will therefore look to other jurisdictions.

The general rule appears to be that in divorce actions, the intent of the parties, if expressed by stipulation or express directive of the court, governs the termination of joint tenancies in marital property. See *Smith v. Smith*, 568 So.2d 838, 840 (Ala.Civ.App.1990); *Lutzke v. Lutzke*, 122 Wis.2d 24, 361 N.W.2d 640, 649 (1985); and *Renz v. Renz*, 256 N.W.2d 883, 886 (N.D.1977).

In *Smith*, the parties' dissolution decree was entered pursuant to an agreement. 568 So.2d at 839. It provided property held in joint tenancy was to be sold within six months and the proceeds divided. *Id.* The \*707 wife died before the house was sold. *Id.* The court determined the clear intent of the parties was that the dissolution decree would have the effect of severing the joint tenancy and creating a tenancy in common. *Id.* at 840.

In *Renz* also, the parties entered into a settlement agreement upon their divorce in which they agreed to sell property held in joint tenancy and split the proceeds. 256 N.W.2d at 884. The property was never actually sold. *Id.* The court concluded the parties had voluntarily severed the joint tenancy relationship, and created in themselves a tenancy in common. *Id.* at 886.

Roberta relies on the cases of *In re Estate of Woodshank*, 27 Ill.App.3d 444, 325 N.E.2d 686 (1975), and *Nichols v. Nichols*, 43 Wis.2d 346, 168 N.W.2d 876 (1969). However, in both of those cases the dissolution decree specifically provided that the property would remain in joint tenancy, but gave

each party the right to sell. 325 N.E.2d at 688; 168 N.W.2d at 877. Thus, it would appear the parties intended the property to remain in joint tenancy, and the courts in those cases so found. *Id.*

In the present case, we conclude the stipulation between the parties to sell the property and divide the proceeds clearly manifests an intent on the part of the joint tenants to sever the joint tenancy. Our supreme court in the *Baker* case, 78 N.W.2d at 866, noted: "It has been held a contract or covenant to convey an interest which can be enforced in equity will operate to sever a joint tenancy."

We determine Roberta and Tim were tenants in common at the time of Tim's death. Therefore, the estate is entitled to an interest in one-half of the property as a tenant in common.

Roberta also contends the estate's claims are barred by the statute of limitations. We note the district court did not rule on this issue and Roberta did not file a motion pursuant to *Iowa Rule of Civil Procedure 179(b)*. Therefore, this issue was not properly preserved for review and we will not consider it on appeal. See *Hsu v. Vet-A-Mix, Inc.*, 479 N.W.2d 336, 338 (Iowa App.1991). But even if the issue had been properly preserved for appellate purposes, we find it to be without merit.

We affirm the decision of the district court.

AFFIRMED.

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END OF DOCUMENT

37. **Error in Legal Description.**

**FACTS:** I am reviewing an abstract where there has been a platted subdivision. The subdivision itself looks fine. The problem stems from before the subdivision. A Survey filed January 10, 1976 appears in the abstract. The actual legal description in words has an error in a measurement. It says "705.43 feet" when it should say "541.93 feet". However the words in the legal description correctly reflect that the measurement goes to a correct reference point. The actual wording is "... thence North 89°03' West along the North line of the Southwest Fractional Quarter (SW Fr. ¼) of the Southwest Fractional Quarter (SW Fr. ¼) of said Section 7, a distance of 705.43 feet to the Northwest (NW) corner thereof; . . ." The survey plat which accompanies the worded legal description shows the correct 541.93 feet.

The property was conveyed to Mr. H with the error contained in the legal description on the deed. When you use the legal contained in the deed to H, you cannot get back to the point of beginning. The property does not close. H then conveyed part of the property to the City of Sioux Rapids in 1999. The portion of the property which was re-surveyed and conveyed to the City of Sioux Rapids is on the West side of the property and is completely contained in the legal description to H, even though the transfer to him does not close. The City then subdivided the property which they purchased and the Plat does contain a title opinion showing no objections.

My clients wish to purchase a lot from the subdivision.

The subdivision Plat was recorded in 2000 so it has not been recorded more than 10 years. Marshalls says that, "the general rule is that a description in a deed is valid if the tract described may accurately be located by a competent surveyor." A surveyor could locate the property transferred to Mr. H with the erroneous legal description because it also describes the correct reference point.

**QUESTION:** Is any curative action necessary? If so, what?

**RESPONSE(S):** Yes. An affidavit from the land surveyor who prepared the plat should be obtained setting out the correct measurements.

38. **Incomplete Legal Description.**

**FACTS:** I have been asked to "fix" a two-year old conveyance. B sold Whiteacre and Blackacre to A for a stated price. A paid the price and received a Warranty Deed from B for Whiteacre. Through an oversight of some sort the deed did not include the description of Blackacre. B acknowledges this and wants now to convey Blackacre to A. A has been in possession of both Whiteacre and Blackacre ever since the time of receiving the deed for Whiteacre.

**QUESTION:** Should I prepare a corrective deed conveying both Whiteacre and Blackacre and refer to the earlier deed, or simply convey Blackacre now and indicate consideration less than \$500.00? Or something else?

**RESPONSE(S):** I'd suggest a "Corrective Deed".

\* \* \*

You might decide to check on the status of the title at this point. Since A's name was not on the deed and B's was, some liens may be hanging around out there.

\* \* \*

I would prepare a corrective warranty deed but refer to Iowa Code Section 428A.2(10) indicating it is a deed without additional consideration to correct or supplement a previously recorded deed. In this way the correct legal description will relate back to the original deed.

\* \* \*

What about the rights of intervening creditors? There is a weak relation back doctrine in Iowa, but I think you still have to account for intervening judgments, etc.

39. **Property Tax Redemption.**

**FACTS:** Iowa Code Chapter 447.9 provides "The ninety day redemption period begins as provided in Section 447.12".

Iowa Code Chapter 447.12 provides "Service is complete only after an affidavit has been filed with the county treasurer, showing the making of the service . . ."

The property owner must be given notice under Section 447.9 of the tax sale purchaser's intent to obtain a tax sale deed and of the 90 day redemption period, but I think there is a due process issue here, because there is no provision in the Code that I can find that requires any notice be given to the property owner of the date the Affidavit is filed.

Thus the property owner has no notice of the exact date the 90 days runs out.

**QUESTION:** I understand there may be litigation on this issue working its way through the Courts. Is anyone aware of this litigation and the name of the attorney handling it?

**RESPONSE(S):** This author is unaware of such pending litigation as of this writing.

40. **Tax Deed – Affidavit of Completed Service.**

**FACTS:** Iowa Code Sections 447.9 and 447.12 require filing an affidavit of completed service with the Treasurer's Office and Iowa Code Section 448.15 states the so-called 120-Day Affidavit may be filed with the Recorder's Office.

Title Standard 1.8 seems to state that an affidavit of completed service needs to be filed with the Treasurer's Office as well as the Recorder's Office so it can be indexed in the Claimant's Index. ("The abstract must also show when the affidavit was indexed in the Claimant's Index because the affidavit has no effect until so indexed.")

**QUESTION:** Apparently, there is no Claimant's Index anymore because it was eliminated. Am I misreading the Title Standard?

**RESPONSE(S):** One lawyer responds: I was able to get the abstracter to abstract the service affidavit from the Treasurer's Office. As for the Claimant's Index, you are not misreading. There is a requirement for the Claimant's Index, and there is no Claimant's Index. It is my understanding that Polk County claims its website search and electronic search via legal description is in lieu of the Claimant's Index. After considering between how a court would likely address it combined with Title Standard 1.1, I allowed the transaction to proceed without the date of indexing in the Claimant's Index. I used the date of filing in lieu of said date.

41. **Bare Legal Title.**

**FACTS:** Husband and Wife buy Parcel A on contract in 1986. Two months after that contract is signed, Wife quit claims her interest in the property to Husband. Two years later contract sellers give a deed to both Husband and Wife in satisfaction of their contract. Husband and Wife then get divorced and the decree does not specifically deal with Parcel A. The decree just has a general statement that the parties are awarded all the property in their name. Husband now deeds Parcel A to his stepdaughter so she can put a home on Parcel A. Wife now has a judgment against her for \$5,000.00 that was filed August 5.

Both parties agree that it was meant to be the property of Husband. They thought the quit claim deed from Wife to Husband took care of her interest. I assume they did not inform their divorce attorneys about Parcel A.

**QUESTION:** Does Wife still have an interest that this judgment could attach to and would a nunc pro tunc decree take care of her interest if it vested title in Husband?

**RESPONSE(S):** In some states and in some Iowa opinions, after-acquired title treatment has been rejected in circumstances involving a quit claim deed. See French v. Bartel & Miller, 164 Iowa 677, 146 N.W. 754 (1914); Irish v. Steeves, 154 Iowa 286, 34 N.W. 634 (1912).

Where, however, circumstances point towards a quit claim deed having involved some demonstrable intent of conveyance (versus merely the release of a speculative interest), after-acquired title has been applied to pass to the grantee an interest the grantor acquired after the date of the earlier instrument. See Pring v. Swarm, 176 Iowa 153, 157 N.W. 734 (1916).

\* \* \*

Wife acquired an interest in the property by the deed from the sellers. The decree of dissolution does not transfer that interest. Therefore Wife's judgment lien attaches to the property. The earlier quit claim deed does not transfer after acquired property to Husband.

\* \* \*

Another lawyer disagreed.

Pretend we're talking about two single brothers buying the property. They obtain equitable title with the contract. One deeds his interest to the other by way of a quit claim deed. The deed in satisfaction (perhaps executed at the time

of the contract and escrowed or perhaps the seller was never notified of the assignment of interest) is made out to both brothers. The deed in satisfaction is little more than a release of the bare legal title interest the seller retained (Marshall's treats a deed in satisfaction similarly to a mortgage release). Would you in that case find a judgment of the brother who quit claimed his interest attached to the property? Would a court equitably foreclose on this property after the quit claim deed on a judgment against the brother who signed the quit claim deed and later obtained the judgment? I have a hard time believing that.

I don't see how this case is any different. The dower interest terminated upon the dissolution, and the ex-husband would have title clear of the judgment.

\* \* \*

Yet another lawyer wrote:

It would seem to me that the answer to your question might include the following:

1. Get a Quit Claim Deed from the ex-wife to the ex-husband combined with an affidavit of the attorney(s) involved that the wife's interest was included in the deed in fulfillment of contract by error. I'd ignore the Judgment liens.

2. Assuming the above is unavailable get an Order Nunc Pro Tunc clarifying the intent of the parties, perhaps even signed by both sides to the divorce. Added to that might be the addition of an affidavit from the attorneys as to their understanding of the intent of the parties and the Court.

3. I don't believe the suggestion that was made to re-record the existing deed is a good one due to the recent case McNertney v. Kahler, 710 N.W. 2d 209 (Iowa 2006). Essentially that case dealt with the addition of a party to an escrowed deed after a contract rather than the subtraction of one as contemplated here. Nevertheless I would think the logic would be the same.

42. **Lis Pendens.**

**FACTS:** Under lis pendens Iowa Code Sections 617.10-.15, the county clerk is no longer required to maintain a lis pendens index book which the public can access. Rather the clerk puts information on the computer for Iowa Courts on Line. Where the general public cannot search actions by legal description. Where you need to subscribe to their services to search for cases by legal description.

If the plaintiff has filed, for example, a mortgage foreclosure petition and after that there is a document filed by a third party purporting to effect the real estate, under the computer system described above with no lis pendens "book", is there compliance with Iowa Code Sections 617.10-.15; e.g. effective lis pendens prohibiting the document from affecting the real estate?

**QUESTION:** What are your thoughts on lis pendens I.C. 617.10-15 where the county clerk no longer maintains a lis pendens book which the public can access.

**RESPONSE(S):** It is my understanding that ICIS (Iowa Court Information System) will have a notation that the pending action affecting the real estate is entered in the lis pendens indexing system. A notation such as " \_\_\_\_\_ " will be made on ICIS.


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# IOWA JUDICIAL BRANCH

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Friday, November 3, 2006

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All counties in Iowa were moved to the Iowa Court Information System (ICIS) as of September 1997. Some counties began entering data as early as October of 1991. Be advised, depending on the county, cases prior to September of 1997 may exist in manual docket format only and are not available on this page. [County Start Date Index](#).

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43. **Bankruptcy Sale Free and Clear of Liens.**

**FACTS:** Legal title to real estate is vested in an LLC, the single member of which is a corporate Chapter 7 Debtor. Various consensual liens have attached pre-filing to the real estate by grant of the subsidiary LLC. The subsidiary LLC is not a named debtor. The Trustee has Court authority to "Operate the Subsidiary". The Trustee has filed a motion for sale free and clear of liens. We can assume that proper notice has been mailed to the various creditors holding liens created by the Subsidiary LLC. The Bankruptcy Court approves the sale free and clear of liens.

**QUESTION:** Insofar as the subsidiary is not a debtor, does the Court have *in rem* jurisdiction over the legal title to the real estate itself and thus does have jurisdiction to order a sale free and clear of liens.

**RESPONSE(S):** From a real estate perspective, I agree that this is a problem. I do not believe the court has jurisdiction to clear out the liens of the LLC (which I assume are judgment liens). Rather, it appears to me that the Trustee could go through the dissolution procedure for the LLC, pay creditors and lien holders pursuant to statute, and the net assets of said LLC would then be an asset of the bankruptcy estate.

\* \* \*

If notice has been given to the various lienholders, they have not objected and the court has issued an order, assume you can rely on the order. If the parent company has filed bankruptcy, assets of the parent company are subject to jurisdiction of the court. Thus assume the court can, upon proper application, take the action stated.

**III. TITLE STANDARDS COMMITTEE OPINIONS.**

A. Doctrine of After-acquired Property - Quit Claim Deed.

Title Standards Committee Opinion No. \_\_\_\_\_.

Date: February 23, 1998

**STATEMENT OF ISSUE:**

A sells real estate on contract to B. B quit claims and assigns his interest in the contract and the real estate to C. A delivers a deed in fulfillment of the contract to B. What showing is required before accepting a deed from C?

**CONSENSUS OPINION OF IOWA TITLE STANDARDS COMMITTEE:**

A deed from B to C must be obtained and filed for record. If the deed from B to C had been a warranty deed, an after-acquired title will inure to the grantee C. However, this would not be the case where the deed is a quit claim only. For a more complete discussion, see Sections 4.9 and 4.10(B) of Marshall's Iowa Title Opinions and Standards.

**DISCLAIMER.** THE ABOVE OPINION REPRESENTS THE THINKING OF A CONSENSUS OF THE TITLE STANDARDS COMMITTEE OF THE IOWA STATE BAR ASSOCIATION AND IS NOT, NOR IS IT INTENDED TO BE, A TITLE STANDARD.

B. Power of Sale in the Will.

Title Standards Committee Opinion No. 1996-57.

Date: December 20, 1996

**STATEMENT OF ISSUE:**

May an executor of an estate, relying only upon the power of sale contained in a Will granted to the executor with respect to real estate, pass good title on a real estate transaction initiated after the date of death and before the period for challenging the admissibility of the Will has expired?

**CONSENSUS OPINION OF IOWA TITLE STANDARDS COMMITTEE:**

Yes, an executor may convey real estate pursuant to a power of sale contained in the Will prior to the time any challenges to the admissibility of the Will have expired. This opinion is based upon the theory of a good faith purchaser for value and we rely in part upon Section 16.8(d) of Marshall's Iowa Title Opinions and Standards in which a question was addressed to the author as to what would happen if after a sale the Will might be set aside in a successful contest. The author indicates that good faith purchasers would be protected. The bona fide purchaser for value theory would protect the purchaser if the Will was later found to be invalid and the proceeds from the sale of the property would be the assets the challengers could look to in the event the Will is set aside.

**DISCLAIMER.** THE ABOVE OPINION REPRESENTS THE THINKING OF A CONSENSUS OF THE TITLE STANDARDS COMMITTEE OF THE IOWA STATE BAR ASSOCIATION AND IS NOT, NOR IS IT INTENDED TO BE, A TITLE STANDARD.

C. Contract - Joint Tenancy.

Title Standards Committee Opinion No. \_\_\_\_\_.

Date: February 23, 1998

**STATEMENT OF ISSUE:**

A contract for the sale of real estate named the vendees as Husband and Wife, as joint tenants with full rights of survivorship and not as tenants in common. A warranty deed is subsequently delivered in fulfillment of the contract to Husband and Wife without the joint tenancy language. Thereafter, Wife died. Later, Husband died and the real estate is conveyed by the Executor of his estate. What showing must be made before accepting a deed from the Executor of the Husband's estate?

**CONSENSUS OPINION OF IOWA TITLE STANDARDS COMMITTEE:**

A probate of the Wife's estate is necessary because the warranty deed created a tenancy in common and, therefore, the Wife's undivided one-half interest will pass through her estate. If the Wife's date of death is more than five years prior, then see Iowa Title Standards 9.8 and 9.15. For a more complete discussion, see Section 20.3(C) of Marshall's Iowa Title Opinions and Standards.

**DISCLAIMER.** THE ABOVE OPINION REPRESENTS THE THINKING OF A CONSENSUS OF THE TITLE STANDARDS COMMITTEE OF THE IOWA STATE BAR ASSOCIATION AND IS NOT, NOR IS IT INTENDED TO BE, A TITLE STANDARD.

D. Mortgage - Parties.

Title Standards Committee Opinion No. 98-65.

Date: February 17, 1999

**STATEMENT OF ISSUE:**

Does the signature on a mortgage by a non-titleholder (and one not married to the titleholder) create a stray instrument pursuant to Iowa Title Standard 4.5?

**CONSENSUS OPINION OF IOWA TITLE STANDARDS COMMITTEE:**

Yes. However, if examining the abstract for the mortgagee under the mortgage containing the signature of the nonowner, and if no one other than the mortgagee can reasonably be expected to rely on the title opinion, in the opinion of the Committee this defect can be waived.

**DISCLAIMER.** THE ABOVE OPINION REPRESENTS THE THINKING OF A CONSENSUS OF THE TITLE STANDARDS COMMITTEE OF THE IOWA STATE BAR ASSOCIATION AND IS NOT, NOR IS IT INTENDED TO BE, A TITLE STANDARD.

E. Judgment Lien - Joint Tenancy Property.

Title Standards Committee Opinion No. 1996-55.

Date: September 24, 1996

**FACTS:**

On July 19, 1990, a joint tenancy deed between A and B is prepared and recorded. On August 24, 1995, A dies. The property is being sold in A's estate and the abstract is continued down to date for examination. The abstracter stopped his search as to A as of July 19, 1990, when the joint tenancy deed was recorded. A judgment lien was entered on July 20, 1990 against A ("C" judgment creditor). There is no levy of execution.

**CONSENSUS OF IOWA TITLE STANDARDS COMMITTEE:**

The real estate can't be sold in A's estate because on the death of A, B is the sole owner. See 1 Patton on Land Titles, 630 (2d ed. 1957); II American Law of Property, 10-11; III 637-638 (Casner ed. 1952); Suppl. - American Law of Property, 159-161 (Casner ed. 1977).

No search is required against a deceased joint tenant and C has no lien against the real estate. See Iowa Land Title Standard 9.9, Iowa Abstracting Standards, VIII (1994). [Note - We recognize abstracters often search up to the date of death of a deceased joint tenant but unless there has been a levy of execution and sale before the death of A, we do not think this is necessary and the Land Title Abstracting Standard is correct.] Frederick v. Shorman, 259 Iowa 1050, 147 N.W. 2d 478, 484 (1956); I Kurtz, Iowa Estates Sec. 11.2 (3<sup>rd</sup> ed. 1995).

**DISCLAIMER.** THE ABOVE OPINION REPRESENTS THE THINKING OF A CONSENSUS OF THE TITLE STANDARDS COMMITTEE OF THE IOWA STATE BAR ASSOCIATION AND IS NOT, NOR IS IT INTENDED TO BE, A TITLE STANDARD.

F. Bankruptcy Documents.

Title Standards Committee Opinion No. 1996-53.

Date: September 24, 1996

**STATEMENT OF ISSUE:**

In a county where the bankruptcy court is not located, may bankruptcy documents required by Title Standard 13.5 be filed with the Clerk of the Iowa District Court and must a title examiner require that bankruptcy documents be certified by the Clerk of the Bankruptcy Court? This case involves a foreclosure in a state district court where the mortgagors subsequently filed bankruptcy. An uncertified copy of the bankruptcy petition, motion to lift stay, resistance to motion to lift stay, order granting relief from stay and report of abandonment of property were placed in the Iowa District Court's file but were not docketed in the foreclosure proceeding. No file stamp of either the Iowa District Court or the Bankruptcy Court was found on these documents. The Iowa District Court, in its decree of foreclosure, found that the real estate was abandoned by the Trustee in bankruptcy and that the Bankruptcy Court granted the foreclosing bank relief from the stay in Bankruptcy Court and that more than 30 days have passed since the entry of the order by the Bankruptcy Court granting relief from the stay although the abstract does not show the Iowa District Court findings.

**CONSENSUS OPINION OF IOWA TITLE STANDARDS COMMITTEE:**

Iowa Code Section 558.1 allows, but does not require, certain bankruptcy documents to be recorded as provided for in Chapter 558. Title Standard 13.5 is silent as to where the various bankruptcy documents are to be filed.

In this case, it is obvious from the Iowa District Court ruling that the Court relied on the bankruptcy papers and made findings concerning the bankruptcy action. Under these facts, a prospective purchaser or lender would not reasonably be expected to be subject to the hazards of an adverse claim or litigation. Therefore, under Title Standard 1.1, no objection should be made as to the title. However, the abstract should be expanded to show that the Iowa District Court judge made findings regarding the bankruptcy proceedings.

**DISCLAIMER.** THE ABOVE OPINION REPRESENTS THE THINKING OF A CONSENSUS OF THE TITLE STANDARDS COMMITTEE OF THE IOWA STATE BAR ASSOCIATION AND IS NOT, NOR IS IT INTENDED TO BE, A TITLE STANDARD.

G. Power of Sale in Will - Notice of Sale.

Title Standards Committee Opinion (November 1992).

**STATEMENT OF ISSUE:**

In the administration of an Iowa estate, where the Will gives the executor a power of sale, the executor seeks Court approval to sell the real estate to one of the beneficiaries who is also a brother of the executor. The executor wanted to give all beneficiaries an opportunity to object or consent and all living beneficiaries did consent after receiving notice. Does lack of notice of sale to contingent beneficiaries whose identity would not be known until the death of the life tenant render such sale invalid?

**OPINION:**

Iowa Code Section 633.383 provides, "When power to sell, mortgage, lease, pledge or exchange property of the estate has been given to any personal representative under the terms of any will, the statutory requirements with reference to procedure for such purposes shall not apply." This rule was long recognized in Iowa case law prior to its codification in 1963. DeLong v. Scott, 217 N.W. 2d 635, 637 (Iowa 1974). Section 633.350 provides, in part, that title to a person's property passes to the person to whom it is devised by the person's last Will but the property is subject to possession by the Personal Representative for purposes of administration, sale, or other disposition under the provisions of law.

It is the opinion of the Committee that the executor retained and used the power of sale and that no notice was required to be given to contingent or unascertained beneficiaries. The sale is not invalid.

**DISCLAIMER.** THE ABOVE OPINION REPRESENTS THE THINKING OF A CONSENSUS OF THE TITLE STANDARDS COMMITTEE OF THE IOWA STATE BAR ASSOCIATION AND IS NOT, NOR IS IT INTENDED TO BE, A TITLE STANDARD.

H. Conveyance Language in a Will.

Title Standards Committee Opinion (November 1992).

**STATEMENT OF ISSUE:**

Is a Will conveyance to "John Doe, or to his heirs" too ambiguous or undeterminable to render marketable title in John Doe?

**OPINION:**

To render title unmarketable by ambiguity, the objection must generate a reasonable probability of litigation. DeLong v. Scott, 217 N.W. 2d 635 (Iowa 1974); Title Standard 1.1.

The words "John Doe, or to his heirs" granted an absolute and fee estate in John Doe. The words "and his heirs" were superfluous and are not an alienation of the prior fee. The Will conveyance language, although not a model of clearness and precision, conveyed marketable title to John Doe. Hudnutt v. John Hancock Mt. Life Ins. Co., 224 Iowa 430, 437, 274 N.W. 581, 585 (1937).

**DISCLAIMER.** THE ABOVE OPINION REPRESENTS THE THINKING OF A CONSENSUS OF THE TITLE STANDARDS COMMITTEE OF THE IOWA STATE BAR ASSOCIATION AND IS NOT, NOR IS IT INTENDED TO BE, A TITLE STANDARD.

I. Probate - Tenants in Common - Will.

Title Standards Committee Opinion (November 1992).

**STATEMENT OF ISSUE:**

Husband and wife own Blackacre as tenants in common. Each has a will leaving his or her interest in Blackacre to the surviving spouse. Upon the death of one spouse the will is admitted to probate without present administration and the surviving spouse files an election to take under the will. What, if anything, in addition to a probate without administration, need be done to establish that the property is not subject to lien of Iowa Inheritance Tax?

**OPINION:**

Under Iowa Code §450.7, assuming the spouse died on or after January 1, 1988, Blackacre would not be subject to a lien of Iowa Inheritance Tax and no further showing need be made. However, the question which has been addressed to the Committee does not indicate that all of the property of the spouse, who is now deceased, was given to the other spouse. If one spouse bequeathed all of his or her property to the other spouse, then no Iowa Clearance of Inheritance Tax would be necessary. However, this is not clear from the question, and if only Blackacre was given to the spouse then, of course, a Clearance of Inheritance Tax would have to be obtained as to the remainder of the estate given to other parties. Even though the question did not ask whether or not title would be marketable in this situation, the Committee believes that the method of handling the above situation has not been done in such a manner as to render title marketable. There is no ability through a probate without present administration to clear all debts and claims of the estate, and therefore title would not be marketable in accordance with Iowa law. Under Iowa Code §633.413, any claims and debts would not be barred until five years after the death of the decedent. Therefore, under the fact situation as given above, it would not appear to the Committee that the title is marketable when a probate without present administration is utilized.

**DISCLAIMER.** THE ABOVE OPINION REPRESENTS THE THINKING OF A CONSENSUS OF THE TITLE STANDARDS COMMITTEE OF THE IOWA STATE BAR ASSOCIATION AND IS NOT, NOR IS IT INTENDED TO BE, A TITLE STANDARD.

J. Survey Plats.

Title Standards Committee Opinion (November 1992).

**STATEMENT OF ISSUE:**

(1) Whether §409A.21, The Code, 1991, cures the omissions of survey and plat dated June 4, 1974, and recorded June 6, 1974, in Book K at page 434 in the office of the Chickasaw County Recorder (copy attached).

(2) Is "the bank of the Cedar River" and adequate boundary description?

**OPINION:**

§409A.21 provides that "an action shall not be maintained, at law or in equity, in any court, against a proprietor, based upon an omission of data shown on an official plat or upon an omission, error, or inconsistency in any of the documents required by this chapter unless the action is commenced within 10 years after the date of recording of the official plat." "Official plat" is defined in §409.2(11), The Code, 1991, as "either an auditor's plat or a subdivision plat that meets the requirements of this chapter and has been filed for record in the offices of the recorder, auditor, and assessor." Chapter 409A became effective July 1, 1990. §4.5, The Code, 1991, provides that, "a statute is presumed to be prospective in its operation unless expressly made retrospective."

The survey and plat of Millrock Heights Subdivision, Nashua, Chickasaw County, Iowa, recorded June 6, 1974, is not accompanied by the various attachments referred to in §409A.11. Entire documents required for recording the plat are not shown.

There is no provision in §409A.21 expressly making it retrospective. Instead, the statute makes reference to "official plat" which is defined as an auditor's plat or a subdivision plat "that meets the requirements of this chapter" (emphasis supplied). Since the application of the statute is limited to curing omissions, errors or inconsistencies in plats meeting the requirements of Chapter 409A, it is prospective in operation only. The Committee's opinion is that §490A.21, The Code, 1991, does not apply to plats recorded prior to July 1, 1990 since they are not official plats as defined in §409A.2(11), The Code, 1991.

You are referred to Marshall's Iowa Title Opinions and Standards Annotated §14.1(j)(2d ed. 1978), in which Jesse Marshall states, "... I am of the opinion that a violation of a provision of Iowa Code, Ch. 409 does not *ipso facto* produce a reasonable probability of good faith litigation rendering title unmarketable." Thus, despite the omission of documents from the plat, title to the real estate abstracted is not necessarily unmarketable.

You also ask whether "the bank of the Cedar River" is an adequate boundary description. §409A.2(10), The Code, 1991, defines "metes and bounds description" as "a description of land that uses distances and angles, uses distances and bearings, or describes the boundaries of the parcel by reference to physical features of the land." Certainly, the bank of the Cedar River is a reference to a physical feature of the land. §409A.4(1), The Code, 1991, provides that, "the grantor of land which has been divided using a metes and bounds description shall have a plat of survey made of the division." §409A.2(5), The Code, 1991, defines "division" as "dividing a tract or parcel of land into two parcels of land by conveyance or for tax purposes."

Op. Atty. Gen. (Frisk), May 1, 1991, states that a plat of survey is not required for a conveyance of an existing parcel after June 30, 1990, if the parcel is described by metes and bounds and had been conveyed prior to July 1, 1990 by the same description without a plat of survey. From the facts furnished, it is not possible to determine whether a plat of survey would be required in this instance. If a plat of survey is required, it must show the meander of the bank of the Cedar River. §114A.1(16), The Code, 1991 defines "meander line" as a "traverse approximately along the margin of a body of water. A meander line provides data for computing areas and approximately locates the margin of a body of water. A meander line does not ordinarily determine or fix boundaries." §114A.7(13), The Code, 1991, provides that "if any part of the surveyed land is bounded by an irregular line, that part shall be enclosed by a meander line or an offset line showing complete data with distances along all lines extending beyond the enclosure to the irregular boundary, and shown with as much certainty as can be determined, or as 'more or less,' if variable. In all cases, the true boundaries shall be clearly indicated on the plat." These provisions of Chapter 114A do not apply if a plat of survey is not required since title examiners have long accepted reference to physical boundaries as acceptable components of an adequate legal description.

**DISCLAIMER.** THE ABOVE OPINION REPRESENTS THE THINKING OF A CONSENSUS OF THE TITLE STANDARDS COMMITTEE OF THE IOWA STATE BAR ASSOCIATION AND IS NOT, NOR IS IT INTENDED TO BE, A TITLE STANDARD.

K. Affidavit of Surviving Spouse.

Title Standards Committee Opinion (November 1992).

**STATEMENT OF ISSUE:**

Whether the Affidavit of Surviving Spouse for Change of Title to Real Estate should contain language that the deceased did not have a contractual Will? The Iowa State Bar Association Official Form No. P249.

**OPINION:**

No. The Affidavit of Surviving Spouse for Change of Title to Real Estate is only applicable to situations involving joint tenancy property. The survivor in a joint tenancy property acquires the interest of the deceased and the interest of the deceased in the property does not pass to his or her heirs. In re Miller's Estate, 248 Iowa 19, 79 N.W. 2d 315 (1956). A will cannot revoke joint tenancies. In the Matter of the Estate of May K. Boldt, 342 N.W. 2d 463 (Iowa 1983). Contractual wills have no effect on the transfer of title to the surviving spouse by operation of law.

**DISCLAIMER.** THE ABOVE OPINION REPRESENTS THE THINKING OF A CONSENSUS OF THE TITLE STANDARDS COMMITTEE OF THE IOWA STATE BAR ASSOCIATION AND IS NOT, NOR IS IT INTENDED TO BE, A TITLE STANDARD.

L.        Agricultural Land - Right of First Refusal.

Title Standards Committee Opinion (November 1992).

**STATEMENT OF ISSUE:**

Section 654.16A, requires the granting of a right of first refusal following recording of a Sheriff's Deed to agricultural land. The statute states that if "the grantee proposes to sell or otherwise dispose of the agricultural land...grantee shall first offer mortgagor the opportunity to repurchase the agricultural land based on the same terms and at the same price that the grantee proposes to sell or dispose of the agricultural land." Suppose owner disposes of the property under his Will or gives it to his wife by deed. Does this mean mortgagor has the right to receive this property at no cost?

**OPINION:**

It certainly was not the intention of the legislature to give the agricultural land at no cost to the mortgagor if grantee of the Sheriff's Deed made a gift of the agricultural land or died leaving it in his estate.

We believe the statute would be construed to continue the obligation of the grantee of the Sheriff's Deed in the donee, personal representative, or devisee of said grantee.

We feel there should be some termination time on this right of first refusal. We would recommend the legislature amend the statute and set a termination period of not to exceed 5 years after the date of the Sheriff's Deed.

**DISCLAIMER.** THE ABOVE OPINION REPRESENTS THE THINKING OF A CONSENSUS OF THE TITLE STANDARDS COMMITTEE OF THE IOWA STATE BAR ASSOCIATION AND IS NOT, NOR IS IT INTENDED TO BE, A TITLE STANDARD.

#### **SECTION IV. Use of Affidavits.**

**Iowa Code Section 558.8 provides:**

**"558.8 Affidavits explanatory of title-presumption. Affidavits explaining any defect in the chain of title to any real estate may be recorded as instruments affecting the same, but no one except the owner in possession of such real estate shall have the right to file such affidavit. Such affidavit or the record thereof, including all such affidavits now of record, shall raise a presumption from the date of recording that the purported facts stated therein are true; after the lapse of three years from the date of such recording, such presumption shall be conclusive."**

Affidavits should usually make reference to the real estate in question and state that it is made from the personal knowledge of the person who is familiar with said real estate, its titleholders and its parties in possession. Title Standard 8.8 provides that affidavits or recitals should be made by persons competent to testify in court, state facts rather than conclusions and disclose the basis of the maker's knowledge.

## SECTION V. Groundwater Hazard Statements.

Westlaw

Page 1

IA ADC 561-9.2(558)

Iowa Admin. Code 561-9.2(558)

### IOWA ADMINISTRATIVE CODE AGENCY 561 NATURAL RESOURCES DEPARTMENT CHAPTER 9 GROUNDWATER HAZARD DOCUMENTATION

This database is current with amendments effective through August 16, 2006

561-9.1(558) Authority, purpose and application.

9.1(1) Authority. Pursuant to Iowa Code section 558.69, the department is required to adopt rules pertaining to a statement to be submitted to the recorder when recording instruments transferring real property regarding the existence and location of wells, disposal sites, underground storage tanks, and hazardous wastes on the property.

9.1(2) Purpose. The purpose of these rules is to provide the necessary forms, instructions, and explanation of this requirement. It is the purpose of the statute to give notice to the transferee of real property of the condition of the wells, disposal sites, underground storage tanks, hazardous waste disposal, and private burial sites existing on the real estate.

9.1(3) Applicability. These rules shall apply to all persons, corporations, and other legal entities who are transferors or transferees of real property within the state of Iowa as well as all county recorders who are called upon to record instruments transferring real property in Iowa.

9.1(4) When groundwater hazard statement is required. A groundwater hazard statement shall be presented to the county recorder along with the real estate transaction documents for any real estate transaction in which a declaration of value is required to be submitted pursuant to Iowa Code chapter 428A. Additionally, a groundwater hazard statement shall be presented at the time of the recording of the following real estate transaction documents which are exempt from the filing of a declaration of value:

a. Any recorded lease of land which has a term of five years or more;

b. Any voluntary transfer or receipt of real property by governmental entities if title to that property was voluntarily acquired by the governmental entity. Governmental transactions which are exempted from the filing of a groundwater hazard statement include sheriff's deeds, tax deeds, and any other transaction for which the governmental entity did not voluntarily acquire title. A groundwater hazard statement is not required to accompany a clerk's change of title.

<General Materials (GM) - References, Annotations, or Tables>

These rules are intended to implement Iowa Code section 558.69.

[Filed emergency 7/1/87--published 7/29/87, effective 7/1/87]

[Filed emergency 7/31/87--published 8/26/87, effective 7/31/87]

[Filed 12/23/87, Notice 9/9/87--published 1/13/88, effective 2/17/88]

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[Filed 3/14/01, Notice 1/10/01--published 4/4/01, effective 5/9/01]

[Filed 1/28/05, Notice 12/8/04--published 2/16/05, effective 3/23/05]  
**IA ADC 561-9.1(558)**

561-9.2(558) Form.

9.2(1) The transferor, their agent or attorney shall sign department Form 542-0960 "Groundwater Hazard Statement," which may be obtained from the department or local county recorder. An agent or attorney may sign the form for the transferor, but in doing so the agent or attorney represents that a good faith inquiry of the transferor has been made regarding the information contained in the form, and that it is correct.

9.2(2) The form shall be submitted to the county recorder, in the form prescribed by the recorder, at the time that a real estate transaction document with which a groundwater hazard statement is required by 9.1(4) is filed with the county recorder.

9.2(3) In all cases, the county recorder shall return the original of the statement to the transferee when the recorded instrument is returned. If the statement submitted reveals that there is a well, a disposal site, an underground storage tank, or hazardous waste on the property, a copy of the form shall be submitted to the department within 15 days after the close of each month. If a standardized electronic format is established by agreement between the Iowa County Recorders Association and the department, then the department's copy may be submitted electronically in the manner established by the agreement. Forms on which a private burial site is the sole matter disclosed and which do not reveal the existence of a well, disposal site, underground storage tank, or hazardous waste on the property shall not be submitted to the department. Forms shall be retained by the department for a period of five years.

9.2(4) The form shall include the name and address of both the transferor and transferee; the street address of the real estate involved; and the legal description of the real estate involved.

<General Materials (GM) - References, Annotations, or Tables>

These rules are intended to implement Iowa Code section 558.69.

[Filed emergency 7/1/87--published 7/29/87, effective 7/1/87]

[Filed emergency 7/31/87--published 8/26/87, effective 7/31/87]

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Filed 1/28/05, Notice 12/8/04--published 2/16/05, effective 3/23/05]  
**IA ADC 561-9.2(558)**

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#### **General Duties:**

- Responds to public inquiries.
- Opens complaint files.
- Investigates and reports to the Board as to each complaint.
- Answers general inquiries from Iowa lawyers.
- Supervises and administers attorney grievance and disciplinary

(See attached list of ISBA Independent Standing Committee on Ethics and Practice Guidelines Committee Members.)

### **C. IOWA TITLE STANDARDS COMMITTEE MEMBERS 2005-2006**

(See attached list.)

**ISBA INDEPENDENT STANDING COMMITTEE  
ON  
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Title Standards - Sub Comm  
As of 7/18/2006

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Total Records 15

## SECTION VII. Title Standards Scorecard – Update.

Title Standard		Reviewed/ Approved by BOG	To be Reviewed or Approved by BOG
	<b>Chapter 1 – Abstracts</b>		
1.1	Examining Attorney's Attitude	X	
1.2	Abstract in Longhand	X	
1.3	Mimeographed or Photostatic Copy	X	
1.4	Abstracter's Certificate	X	
1.5	Commencing with Filing of Plat	X	
1.6	Ancient Proceedings	X	
1.7	Reciprocal Covenants	X	
1.8	Tax Deed		X
1.9	Ancient Mortgages	X	
1.10	City and County Restrictions	X	
1.11	Access to Property	X	
1.12	Short Form Acknowledgment	X	
	<b>Chapter 2 – Political Subdivisions</b>		
2.1	Showing Required on Sale of Property		X
	<b>Chapter 3 – Private Corporations</b>		
3.1	Authority to Sell Real Property	X	
3.2	Authority to Do Business	X	
3.3	Officers' Authority to Execute Instruments	X	
3.4	Name Variances	X	
	<b>Chapter 4 – Deeds and Contracts</b>		
4.1	Referring to Mortgage		X
4.2	Quit Claim Deed		X
4.3	Showing When Grantee Holds a Mortgage		X
4.4	Contract Forfeiture, Service on Spouse		X
4.5	Stray Deeds and Mortgages		X
4.6	Contract Forfeiture, Service on Minor		X
4.7	Conveyance from Trustee of an Inter Vivos Trust		X
4.8	Deed Severing Joint Tenancy		X
4.9	Contract Severing Joint Tenancy		X
4.10	Late Recording		X
4.11	Life Estates		X
	<b>Chapter 5 – Husband and Wife</b>		
5.1	Recital Grantor Married	X	
5.2	Recital Grantor Not Married	X	
5.3	No Recital of Marital Status	X	
5.4	Variance in Name of Spouse	X	
5.5	No Release of Homestead	X	
5.6	Release of Dower by Attorney-in-Fact	X	
5.7	Joinder of Spouse, Deed from Contract Vendor	X	
	<b>Chapter 6 – Judicial Proceedings</b>		
6.1	Spouse Party in Foreclosure	X	
6.2	Judgment Holder Party in Foreclosure	X	
6.3	Military Service Affidavit		X

6.4	Failure to Appoint Guardian ad Litem		X
6.5	Acceptance of Service by Representative		X
6.6	Filing Supersedeas Bond, Marketable Title	X	
6.7	Removal of Apparent Judgment Lien From Homestead	X	
	<b>Chapter 7 – Mortgages</b>		
7.1	Release by Surviving Joint Tenant	X	
7.2	Recorded Prior to Deed	X	
7.3	Foreclosure and Failure to Release	X	
7.4	Release of Rerecorded Mortgage	X	
7.5	Release, Misdescribed Mortgage	X	
	<b>Chapter 8 – Names</b>		
8.1	Rule of Idem Sonans	X	
8.2	Middle Names or Initials	X	
8.3	Abbreviations	X	
8.4	Name Change, Marriage	X	
8.5	Recital of Identity	X	
8.6	Variance on Deed and Acknowledgment	X	
8.7	Effect of Prefix or Suffix	X	
8.8	Acceptable Affidavits or Recitals	X	
8.9	Affidavit Filed by Owner	X	
8.10	Serious Variance over Ten Years Earlier	X	
	<b>Chapter 9 – Probate</b>		
9.1	Power of Sale in Will		X
9.2	Parties in Real Estate Sale Proceedings		X
9.3	Sale of Real Estate Acquired by Foreclosure		X
9.4	Assignment and Release of Liens		X
9.5	Showing Heirs in Testate Estate		X
9.6	Five Year Statute of Limitations on Deeds		X
9.7	Sale by Heirs Prior to Closing Estate		X
9.8	Showing Required When No Administration		X
9.9	Sale by Surviving Joint Tenant		X
9.10	Contract by Decedent and Deed by Fiduciary		X
9.11	Contract by Decedent and Deed by Surviving Joint Tenant		X
9.12	Showing Required on Sale		X
9.13	Notice of Hearing on Sale Under Code		X
9.14	Notice to Claimants		X
9.15	Nonresident Testate Decedent		X
9.16	Resident Testate Decedent		X
9.17	Conveyance by Conservator		X
	<b>Chapter 10 – Statutes of Limitations and Marketable Title Legislation</b>		
10.1	Affidavit of Possession Under Iowa Code §614.17		X
10.2	Tax Deed 120 Day Affidavit		X
10.3	Filing Tax Title Affidavit		X
10.4	Maturity Not Shown on Mortgage		X
10.5	Ten Years Since Mortgage Matured		X
10.6	Stale Uses and Reversions Act		X
	<b>Chapter 11 – Forty Year Marketable Title Act</b>		
11.1	Remedial Effect	X	

11.2	Unbroken Chain of Record Title	X	
11.3	Interests Created by Root of Title	X	
11.4	Matters Purporting to Divest	X	
11.5	Relationship with Iowa Code §614.17	X	
11.6	Showing of Possession Not Required	X	
11.7	Forty-year Abstract	X	
11.8	Mortgage as Root of Title	X	
	<b>Chapter 12 – Partnerships</b>		
General Comment – Chapter 12	Partnerships	X	
12.1	Conveyance of Property in Partnership Name	X	
12.2	Authority of One Partner to Act for All	X	
12.3	No Marital Rights in Partnership Property	X	
12.4	Conveyance After Death of Partner	X	
	<b>Chapter 13 – Bankruptcy</b>		
13.1	Transferring Property, Abstract Showing		X
13.2	Automatic Stay, Abstract Showing		X
13.3	Transferring Exempt Property		X
13.4	Discharge of Personal Liability, Lien of Judgment		X
13.5	Abandonment of Property, Abstract Showing		X
	<b>Chapter 14 - Condominiums</b>		X
14.1	Documentary Material with Declaration		X
14.2	Contents of Deed		X
14.3	Condominium Conversions		X
	<b>Chapter 15 – Limited Liability Companies</b>		X
15.1	No Marital Rights in Limited Liability Company Property		X
15.2	Authority to Do Business, Foreign Limited Liability Company		X
15.3	When Real Property is Held in Limited Liability Company's Name	X	